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COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES

APPENDIX
COMMENT LETTERS

OCTOBER 1991

A REPORT OF THE
REGISTER OF COPYRIGHTS

COMPLETED

Report

on

Copyright Implications

of

Digital Audio

Transmission Services

APPENDIX - COMMENT LETTERS

DOCKET RM 90-6

October 1991

A Report of

The Register of Copyrights

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 25, 1990

Mr. Ralph Oman
Register of Copyrights
Library of Congress
Department 17
Washington, D.C. 20540

GENERAL COUNSEL
OF COPYRIGHT
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Dear Mr. Oman:

It has recently come to my attention that several companies have begun efforts to operate a new generation of digital audio delivery systems capable of significantly enhancing the quality of prerecorded music as received by the public. I understand that discussions have commenced regarding the possibility of developing a worldwide satellite digital audio broadcasting system.

Because of their reliance on digital, rather than analog transmission, the sound quality potentially available through digital audio systems could equal that available on prerecorded compact disks. Home copiers could connect their digital audio receiver to a digital recorder such as a DAT, to make extremely high quality copies of prerecorded works. Through the combination of this hardware, digital audio systems have the potential to become electronic record stores of the future.

These digital audio systems will provide consumers with a chance to use the latest in sound technology. However, to record companies and their artists, this technology creates serious concerns and raises questions regarding compensation for the public performance of their works. Therefore, I am requesting that your office conduct a study to determine how the rights of copyright owners of sound recordings and performers are protected with respect to digital audio transmissions. Also include in the study any recommendations as to any additional means that may be necessary to protect the rights of copyright owners. Thank you for your assistance in this matter. Please contact Karen Robb at 224-8178 if you have any questions regarding this matter.

Sincerely,

Dennis DeConcini

DENNIS DeCONCINI
United States Senator

DDC/mcw

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ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

DIGITAL AUDIO BROADCAST AND CABLE SERVICES; COPYRIGHT OFFICE STUDY

The following excerpt is taken from Volume 55, Number 206 of the Federal Register for Wednesday, October 24, 1990 (pp. 42916-42918)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 90-6]

Digital Audio Broadcast and Cable Services; Copyright Office Study

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of inquiry.

SUMMARY: The Copyright Office issues this Notice of Inquiry to inform the public that, responsive to a congressional request, it will examine the development of new digital audio broadcast and cable services and the effects implementation of such services may have on performers and copyright [1] owners of copyrightable works under the Copyright Act of 1976, title 17 of the United States Code. The Office seeks public comment as to whether or not delivery of digital audio programming, transmitted by satellite systems, terrestrial systems, or by cable television systems, will affect copyright owners, and, if so, in what manner. In addition, should implementation new [2] audio systems have negative effects on copyright owners for retransmissions of their works, the Office seeks proposals on the proper methods of compensating copyright owners while promoting the greatest availability of creative works to the public.

[1]Error; line should read:
"may have on performers and copyright

[2]Error; line should read:
"addition, should implementation of new"

DATES: Initial comments should be received by no later than December 15, 1990. Reply comments should be received on or before January 31, 1991.

ADDRESSES: Interested persons should submit comments as follows: If sent by mail: United States Copyright Office, Library of Congress, Department 17, Washington, DC 20540. If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, room 407, First and Independence Avenue SE., Washington, DC.

FOR ADDITIONAL INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8380.

SUPPLEMENTARY INFORMATION:

1. Background

The Copyright Office is aware that several organizations in the United States plan to introduce audio services that will provide listeners with digital quality programming delivered to them over cable lines. In addition, other companies have applied to the Federal Communications Commission ("FCC") for permission to use certain frequencies to broadcast digital programming to home and automobile radios via satellite. There has also been discussion of a worldwide digital satellite service. Several foreign countries have already designed, manufactured, and tested digital audio systems that deliver quality signals to listeners via satellite and terrestrial equipment.

Technological developments in digital audio transmission currently follow two paths. The first is digital audio broadcasting, which promises to be a replacement for current FM and AM radio. Digital audio broadcasting is an interference-free, compact disc-quality signal that can be delivered via terrestrial-based and satellite transmission systems. Interest in digital audio broadcasting was sparked by receipt at the FCC of three separate applications requesting frequency allocations and authorization to begin transmission in digital audio format. The applications, filed on May 18, May 22, and July 27, 1990, respectively, petition the Commission for a rulemaking to allocate spectrum, adopt rules for a terrestrial digital audio broadcasting system, and approve satellite carriage and sale of digital audio signals. In response to the applications, the FCC published a Notice of Inquiry seeking comment on the applications, and posing broader regulatory questions as to technical requirements. *See* FCC Docket No. 90-357 (August 21, 1990). Indications are, however, that a regulatory framework will not likely be in place before 1992, which is when the World Administrative Radio Conference is scheduled to consider setting aside frequencies for digital audio broadcasting.

The second development in digital audio services involves cable systems. In the United States three companies are already testing digital audio music services made available via cable, which does not involve the same spectrum allocation limitations that digital audio broadcasting does. Services to be offered to cable subscribers include packages of channels containing all-digital music recorded on compact discs and

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delivered to homes via a special tuner, as well as digital simulcast of the sound tracks of motion pictures and television shows. Because it does not require prior FCC authorization, digital cable radio will probably become widespread sooner than will digital audio broadcasting.

The Chairman of the Senate Subcommittee on Patents, Copyrights, and Trademarks, Senator Dennis DeConcini of Arizona, by letter of July 25, 1990, requested the Copyright Office to conduct a study "to determine how the rights of copyrights owners of sound recordings and performers are protected with respect to digital audio transmissions." The Senator requested that the study include "any recommendations as to any additional means that may be necessary to protect the rights of copyright owners."

By this Notice of Inquiry, the Copyright Office seeks and invites public comment to assist the Office in the preparation of this study.

2. Policy Questions for Addressing Copyright Interests Regarding Digital Audio Broadcasting

Although certain inquiries pending before the FCC focus on technical aspects of digital audio broadcasting, and legislation has been introduced addressing the issue of spectrum allocation, the Office's concern is that the rights and interests of those who own copyrights in works that may easily be transmitted and then copied in digital form should be balanced with the public's interest in enhanced technology and improved sound quality. These concerns bring to light often-aired debates about home taping, the introduction of digital audio taping equipment into the United States' consumer market, and the possible introduction of royalty payment systems.

The Office seeks general comments and specific proposals from interested parties about the state of the technology in the field of digital audio transmissions, the economic viability of proposed systems, and information about how copyright interests might be affected by the introduction of digital audio transmission services. Commenting parties are encouraged to include descriptions of methods for compensating copyright owners for copying of near-perfect reproductions of their works via regional, national, or international digital audio transmission systems. Comments are also invited regarding the impact of copyright controls and royalties on public access to new digital audio transmission services.

Specifically, the Office invites public comment or information regarding the following:

(1) Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works? Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies, or on television? To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?

(2) Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, or compact discs?

(3) Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for compensation for transmission of his/her works? If not could representatives of copyright owners, such as performing rights organizations, accomplish this task?

(4) Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be distributed among copyright claimants? If so, who would be responsible for administering this process?

(5) Should digital audio broadcasters be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for the possible copying of copyrighted works?

(6) Describe existing and contemplated digital audio transmission services, including a description of (a) encryption systems, if any; (b) the means of transmitting prerecorded digital signals; (c) any plans to compress the digital signals; and (d) any proposals concerning transmission of digital subcode information embodied on prerecorded works.

(7) Provide information relating to the business and commercial aspects of digital audio transmission services, including (a) the current number of subscribers and predictions of future growth for existing digital cable services; (b) the anticipated start-up dates and predicted audience size of proposed digital cable and broadcast services; (c) a description of the music channel offerings—both existing and contemplated; (d) the availability of "pay-per-listen" services; and (e) copyright licensing arrangements, if any.

Ralph Oman,
Register of Copyrights.
[FR Doc. 90-28894 Filed 10-23-90; 8:45 am]
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[1]Error; line omitted should read:
"Dated: October 15, 1990"

ML-412
November 1990 - 500

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RIAA

Comment Letter
RM 90-6
No. 1

December 14, 1990

The Honorable Ralph Oman
Register of Copyrights
Copyright Office
James Madison Memorial Building
Room 407
First and Independence Avenue, S.E.
Washington, D.C.

Re: Digital Audio Broadcast and Cable Services; Copyright Office Study (Docket No. RM 90-6)

Dear Mr. Oman:

Submitted herewith for filing are an original and ten (10) copies of the Recording Industry Association of America's comments in the above-captioned proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

RECORDING INDUSTRY
ASSOCIATION OF AMERICA

By _____
David Leibowitz
Senior Vice President
and General Counsel

Enclosure

1020 Nineteenth Street, N.W. ■ Suite 200 ■ Washington, D.C. 20036 ■ Phone: (202) 775-0101 ■ Fax: (202) 775-7253

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Copyright Office Looks At The Future of Digital Music

Washington, D.C. -- The U.S. Copyright Office is conducting a study of the impact of emerging digital cable and digital audio broadcasting systems on the music industry. Digital audio broadcast and cable technologies open a world of new possibilities for bringing digital prerecorded music into the home. Current law does not clearly protect the ability of the creators of recorded music to be paid for putting their work onto the airwaves and over wire. In examining these new opportunities and potential problems, the Copyright Office is certain to consider many different scenarios for the future. While the electronic and consumer options are clear -- the future of the music is not. Outlined below are some future scenarios in roughly the order they are likely to be available to the public in this decade.

Digital Cable

Betty Fermata is a music fanatic who loves to visit the record store at least twice a week. Her budget is a bit stretched right now because she is getting less overtime at work, so for a few extra dollars, she has added a new digital music service to her local cable television subscription that she hopes will allow her to continue to enjoy CD-quality music more economically.

The service is called "New Rock Network" and promises to make new rock albums available to subscribers the moment they can be purchased anywhere in the country. This means that many subscribers will be able to hear the album before it is even available at their local record stores -- hence the motto of the New Rock Network: "The Day Before It Hits the Store."

"New Rock Network" researches new album releases and publishes a monthly program guide telling viewers when they can expect to hear the new releases. Betty can now be sure to keep up with all the latest releases without straining her budget.

Pay-Per-Listen (Digital Cable)

Judy Allegro has just signed up for a new digital cable pay-per-listen service that has recently become available in her area. She heard earlier this week that on Friday evening, the new service will be featuring a new album by Harry Connick, Jr. She consults the monthly program guide and learns that for less than she would have to pay for the album at the record store she can bring the program into her home and make a recording for her personal collection. The program guide even has instructions about how to hook the cable box up to her home recorder and how to set the recording levels at their optimum level.

Judy figures that even though the cable subscription costs her a few dollars every month, it will pay for itself in no time given how much more cheaply she can make her own recordings of the albums she would otherwise buy, without even having to gas up the car.

Digital Broadcast

Allan Reed has always enjoyed having music in his house, but he dislikes the constant interruptions for commercials and announcements that he has to endure with radio broadcasts. In addition, the sound quality of the music that is available over the radio just isn't high enough to satisfy Allan, who, having grown accustomed to the clear sound of compact discs, generally spends a significant amount of money every month on music. But his recent purchase of a brand new digital radio receiver, which he bought to take advantage of the new digital broadcast services available in his area, has changed all that. Allan has found that several of the new services mesh with his interest in bringing CD-quality music into his home without the annoyance of announcements and commerical messages:

WQED offers uninterrupted classical music with short commercial breaks only once at the beginning of every hour;

WXRO broadcasts every night at 11 p.m. a brand new popular music album, in its entirety and without interruption;

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WXYZ offers every night a "featured artist" hour, during which a "greatest hits" collection is broadcast without commercial breaks or announcements.

All of these stations publish monthly program guides and promote their programming during the short announcement breaks that they do have.

Allan immediately hooked his new receiver up to his recording equipment. He doesn't have a digital tape recorder yet, but plans to get one soon. In the meantime, the quality of the recordings he can make with his not-so-old analog cassette equipment is so good that he knows he will be spending substantially less on pre-recorded music than in the past. He has heard that many other stations will be switching to this popular new "no interruptions" format, so he expects to enjoy the benefits of uninterrupted music without having to buy records to get it. He is also looking forward to expanding his collection of "free" home recorded music as more stations offer full-album airplay.

The Celestial Jukebox

Dan Ludwig has just seen an advertisement on TV for a new type of jukebox. Following the instructions in the ad, he uses his modem to dial a "900" number and, once connected, he uses his computer keyboard to choose the particular CD he wants to hear. After a brief pause, a performance of his selection is transmitted to his computer and the stereo system to which the computer is connected. Dan can listen to the CD as it is performed. He can also store the musical performance in his computer memory and make it part of his permanent collection.

Multimedia Library

Frank Riff has a fairly complete collection of the best new age music produced. Frank is also a subscriber to a number of multimedia on-line services, which he can access from his home via his computer, through his modem. He calls up "The Almanac of American Culture," which is literally a multimedia product, featuring written text, spoken text and visual images of movies, books, computer games and music.

He wants to fill in a few gaps and update his new age library so he browses through the "Almanac" and locates several articles on the general subject of new age music and on some of his favorite artists, George Winston and Liz Story.

In almost no time, Frank has "paged" through the "Almanac" articles of interest to him, and has identified several albums that are missing from his collection. He instructs his computer to link up to the "celestial jukebox" service affiliated with the "Almanac" to access the sound recordings he wants. The recordings are transmitted to his computer so he can listen to them and store them as part of his permanent collection. He also has hard copies of the "Almanac" articles printed on his desk-top publisher for retention with his new library recordings.

It should be emphasized that under current law, every single creator of the works used in these scenarios are paid for their investment and effort, except the owners of the sound recordings. Stay tuned...

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Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	
Copyright Office Request	)	RM Docket
for Comments Regarding	)	No. 90-6
Digital Audio Broadcast and	)	
Cable Services	)	

COMMENTS OF
THE RECORDING INDUSTRY ASSOCIATION OF AMERICA
IN RESPONSE TO NOTICE OF INQUIRY CONCERNING
DIGITAL AUDIO BROADCAST AND CABLE SERVICES

I. INTRODUCTION

The Recording Industry Association of America ("RIAA") submits these comments in response to the Copyright Office's October 24, 1990 Federal Register notice seeking comments on copyright-related aspects of digital audio broadcast and cable services. As explained below, these services have far-reaching implications for many copyright constituencies; none, however, will feel their impact more acutely than owners of copyrights in sound recordings.

The advent of digital audio broadcast and cable services mean that sound recordings will be exploited more intensively and extensively than ever before, in ways that will often involve charging the consumer directly, without remuneration to recording companies,

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musicians or artists. This fundamental unfairness must be rectified.

Accordingly, for the reasons outlined below, we urge that the Copyright Office:

1. reiterate its support for a performance right in sound recordings and advance that recommendation to Congress;

2. recommend legislation to require broadcasters and cable operators to transmit accurate and complete digital subcode information embodied in prerecorded digital recordings; and

3. endorse legislative and/or administrative restrictions on the broadcast or transmission of multiple selections from the same album or by the same artist within a specified period of time so as to prevent abuses of the performance right.[1]

II. SUMMARY OF RIAA'S INTEREST AND CONCERNS

RIAA's members account for more than ninety percent of all the prerecorded music that is produced, manufactured and distributed in the United States.

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[1] The Federal Communications Commission has under consideration a proceeding relating to spectrum allocation for digital audio broadcast services. In comments filed in that proceeding, RIAA urged the Commission to adopt rules to require digital audio broadcast and cable services to transmit accurately all digital subcode information contained in digital recordings and to restrict the broadcast or transmission of more than individual songs from prerecorded albums. (Copies of our submissions are attached (Attachments 1 and 2).) We believe that the adoption of such rules is within the FCC's authority. In this proceeding, since the Copyright Office does not have authority to implement such proposals on its own, we urge instead that the Copyright Office make legislative recommendations to Congress on these points.

Recording companies, those they employ, and the artists and musicians who perform the music, depend for their livelihoods upon the integrity of the copyrights our members hold in sound recordings. Naturally, we are deeply interested in new technologies for disseminating or delivering music to the public that have implications for the integrity of those copyrights.

Digital audio broadcast and cable services are such new technologies. These services will make available in the home, via the airwaves and by wire, music of unprecedented and unparalleled quality. The music that reaches the home in this fashion will be as good as what currently is only available to a consumer who leaves the home, drives to the record store and buys a compact disc. With digital broadcasters in a position to offer CD-quality music for "free" and digital cable services poised to offer it at negligible marginal cost to the consumer, it does not take a great deal of imagination to foresee what choices consumers will make.

The implications of these new services are partially, but not entirely, as the Copyright Office's Notice of Inquiry suggests. We are naturally concerned that the new services will provide overwhelming inducements to home taping. But more importantly, these services put in high relief the unfairness of the current copyright law in not recognizing a public

performance right for sound recordings. These new services are founded upon the commercial exploitation of our product. Most egregiously, digital cable services expressly announce their intent to charge subscribers directly for listening to our product. Yet the purveyors of these new services may have no clear legal obligation to pay us for their exploitation of our product.

These services are just the tip of the iceberg. As illustrated by the scenarios set forth at the beginning of the comments, just over the horizon are pay-per-listen services, which, like current cable television pay-per-view services, will enable listeners to obtain a direct, time-certain transmission of an album of their choice with a pricing structure likely to be cheaper than that of record stores. And just beyond that is the advent of on-line electronic delivery services, what some have called the "celestial jukebox," which will enable consumers to select music to listen to at their convenience and even download it as part of their permanent collection. Current law is not clear on the legal obligation of those offering these future services to compensate artists and record companies for their use. In effect, they may be able to resell our entire product line to the universe of our prospective

customers merely for the price of the individual CDs they can buy from their local record stores.

The Copyright Office has previously articulated its support for a performance right in sound recordings. In 1978, after an intensive and exhaustive study of the issue undertaken pursuant to statutory mandate,[2] the Register of Copyrights recommended that Congress enact a performance right in sound recordings, stating that "to leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified."[3]

On the international front, it is now more important than ever that the Copyright Office press forward for such legislation. The Copyright Office, like the U.S. Administration, has been at the forefront of efforts to improve international respect for intellectual property rights throughout the world. Now more than ever, it is time to close a glaring gap in our own copyright law at home, the absence of a performance right in sound recordings, and to enact additional protection that will bring revenue into the U.S. by

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[2] 17 U.S.C. § 114(d).

[3] Register of Copyrights, "Addendum to the Report on Performance Rights in Sound Recordings," Performance Right in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary, 95th Cong. 2d Sess. 114 (1978).

accessing foreign performance royalty pools and preserve once and for all the integrity of copyrights in sound recordings.

III. DIGITAL AUDIO BROADCAST AND CABLE SERVICES AND THEIR IMPLICATIONS FOR COPYRIGHTS IN SOUND RECORDINGS

A. Current and Future Programming Services

The new digital audio broadcast and cable services have far-reaching implications for copyrights in sound recordings, as is made clear by what these services say about themselves, plan to offer, and in some cases, are already offering.

The programming plans of the digital cable services, which are more fully developed than those of the digital audio broadcast industry, involve multichannel offerings with a number of features that are designed to make performances of sound recordings in consumers' homes a viable substitute for album purchases. As one brochure puts it, with the new digital audio service, there will be "no need to spend a fortune on a CD library." See Digital Cable Radio Promotional Materials at Attachment 3.

Most of the digital cable services currently available are essentially commercial-free and announcer-free to replicate as closely as possible the experience of listening to prerecorded music. Likewise, a number

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are planning artist repertory programming, which would afford subscribers a format that competes with "greatest hits" albums. Program guides showing playing times may also be provided. One service, Digital Planet, is planning to further close the gap between digital cable and record store purchases by offering a pay-per-listen service that would entail subscriber payments for "listening" to selected albums.[4]

Some services actually encourage subscribers to tape what they hear instead of buying the album. One service brags that it has a "[f]riendly tape recorder interface" and provides subscribers with a diagram showing how to hook up their tape recorders to the cable box. See Digital Planet Promotional Materials at Attachment 4. The promotional material of another service touts "Album Hours" during which:

> an entire CD will be played from beginning to end, uninterrupted. This will be an ideal opportunity for fans to record the work of a favorite artist from the finest quality audio available. The quality will be the same as recording off their own CD player.

See Digital Cable Radio Promotional Materials at Attachment 3 and "Digital Audio Tuners Benefit from

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[4] We understand that Digital Planet may offer this service in voluntary cooperation with at least one record company, but it is not certain, of course, whether its competitors will similarly seek such permission.

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Cable's Past Mistakes," Multichannel News (1990) at Attachment 5.

B. The Purported "Added Exposure" or "Lack of Harm" That Would Accrue to the Recording Industry Due to Digital Audio Broadcast and Cable Services is Irrelevant to the Granting of a Performance Right in Sound Recordings

Even with the digital audio broadcast and cable services' abundant statements of intent to displace record sales, some observers of developments in this area have argued that the recording industry should be grateful for the added exposure, and by implication, increased sales, that will occur with the advent of digital audio broadcast and cable services. We reject that supposition. Virtually every copyrighted work may be said to "benefit" from exposure, but that is no ground for denying the copyright owner the right to best determine how to market its work to the public. For example, the televised production of "Fatal Vision" boosted sales of the book by the same name, but no one suggested that the author should not be paid for the right to dramatize the book because he derived a collateral benefit from the television production. Moreover, here, digital audio services will provide the very same product available in record stores, thereby fulfilling the consumers' demand and desires for our sound recordings.

Some might also argue that we are not entitled to compensation until we can demonstrate "harm" resulting from the new services. Our response is twofold. First, policy decisions concerning the protection of copyright interests do not depend upon a showing of harm. There is no copyright doctrine of "financial distress" that serves as a precondition to protect creative works, and no converse doctrine of "financial sufficiency" that dictates curtailed protection for such interests. Second, even if a showing of harm were somehow relevant, it is clear that our concerns about harm emanating from these new services is not an idle one. That harm flows from two sources: first, from the opportunities to exploit our product that will be lost because the purveyors of these services are exploiting it, and second, from the home taping that will occur. We doubt that any data, no matter how meticulously collected and documented, would persuade our adversaries on the home taping issue of the harm involved on that front.[5] But what is undeniable is the fundamental unfairness that

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[5] For example, in their recent submission to the FCC on digital audio broadcasting, the Home Recording Rights Coalition cited the recent Office of Technology Assessment Report on home taping, "Copyright and Home Copying: Technology Challenges the Law," but managed to overlook that report's conclusion that approximately 439 million unauthorized tapings of prerecorded works were made in this country from broadcast sources in the one-year period preceding the survey -- before the advent of digital broadcast services. Id. at 154.

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would inhere in allowing new digital audio broadcast and cable services to exploit our product commercially without limitation. It is that unfairness that we urge the Copyright Office to seek to redress.

IV. RECOMMENDATIONS FOR ENSURING ADEQUATE COPYRIGHT PROTECTION FOR SOUND RECORDINGS IN THE DIGITAL AUDIO BROADCAST/CABLE ENVIRONMENT

Our prescriptions for ensuring adequate protection for copyrights in sound recordings are threefold. The Copyright Office should:

1. reiterate its support for a performance right in sound recordings, and recommend to Congress that it enact appropriate legislation to close what the international intellectual property community has come to regard as a glaring gap in U.S. law;

2. recommend legislation to require digital broadcast and cable services to transmit accurate, intelligible and complete digital subcode information, as embodied in prerecorded digital recordings; and

3. endorse legislative and/or administrative restrictions on the broadcast or transmission of multiple selections from the same album or by the same artist within a specified period of time, to eliminate the most blatant inducements to home taping and to prevent abuses of the performance right.[6]

We address each of these recommendations below.

A. The Copyright Office Should Reiterate its Recommendation to Congress that it Enact a Performance Right in Sound Recordings

1. Basic Principles of Fairness Require Recognition of a Performance Right in Sound Recordings

The advent of digital audio broadcast and cable services underscores the unfairness of the absence of a performance right for sound recordings. In the digital cable realm, the packagers of these services plan to charge subscribers directly to listen to our product. Even in the digital broadcast realm, where indications are that there may be no direct charge to listeners, broadcasters are marketing profit-making ventures by touting the attractiveness of our product.[7] There is no

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[6] The Notice of Inquiry seeks comments on whether digital audio broadcast and cable signals should be required to be encrypted as a way of making home tapers "accountable for the possible copying of copyrighted works." 55 Fed. Reg. 42,917. Assuming that adequate protection for copyrights in sound recordings is provided as outlined here, we see no need for government-mandated encryption.

[7] Except in the area of public broadcasting, we all know that the term "free radio" is a misnomer. All that it means is that advertisers support these broadcasts, rather than the listeners themselves, based on the

[Footnote continued on next page]

credible reason that the packagers of these services should not pay for their principal "supplies" -- our product -- just as every business must make provision for payment for its raw materials.

Naturally, the broadcasters and other users of the products of the recording industry favor the status quo. Currently, they do not pay anything for the creative efforts of the musicians, artists and recording companies that produce records. But it has always been patently unfair that broadcasters are free to use the recording industry's product to enhance their own revenues without payment for that use.

We lay special emphasis in these comments, of course, on the unfairness of the absence of a performance right in the digital broadcast/cable environment. But the fact is that the absence of a performance right for sound recordings has been an intellectually indefensible gap in the copyright law for many years.

The rudimentary policy underlying copyright law is the provision of exclusive rights to the copyright owner to control the use of its work, including the right of public performance. This principle currently

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[Footnote continued from previous page]
number of listeners attracted to our musical programming. The only thing "free" about "free radio" is the broadcasters' "free" use of our product.

applies to every copyrighted product capable of being performed except the sound recording. The right is recognized for literary, musical, dramatic and choreographic works as well as for pantomimes, motion pictures and other audiovisual works.[8] Recording companies are thus in the ironic position of being able to control the public performances of their works as embodied in music videos, but not for the performance of the very same music over the radio as embodied in sound recordings.

The creative contributions of those who are responsible for putting sound recordings into the hands of the public are no less valuable and no less worthy of recognition and remuneration than are the efforts of those who create works that are protected by a performance right. For example, a performing artist's interpretation of a song is no less a contribution to or an integral part of the recorded product than is the composer's score and lyrics. Consider the various renditions of the song "Pink Cadillac" as recorded by Aretha Franklin, Natalie Cole and Bruce Springsteen, among others. Each rendition is a distinct and unique product because of the creative contributions of the principal vocalist and the supporting artists and

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[8] 17 U.S.C. § 106(4).

musicians, as well as of the producers and recording engineers, whose combined talents make the vocalist's performance even more definitive.

Indeed, it is often the artist's performance as much as -- or more than -- the composer's tune that makes the recording attractive to the listening public. To pick a seasonal example, there are dozens of recorded versions of "White Christmas", but it is Bing Crosby's memorable rendition that resurfaces as the popular favorite each year at this time.[9] More often than not, the artist, not the composer, determines the level of airplay for a song. In fact, often, a song that has enjoyed only modest exposure when recorded by one artist becomes a hit when re-recorded by another. But the performance royalty stream that results from the airplay and other public exposure of a hit song benefits only the composer and the music publisher; not the performing artist, not the musicians, and not the record company -- without whom there would be no hit song.

While the discussion above has been in the context of hit songs, it must be recognized that only a tiny fraction of the recording industry's product --

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[9] "White Christmas" is an especially relevant example of a classic sound recording with extensive airplay, but marginal continued record sales each December. Thus, the reproduction right cannot begin to compensate those involved in the creation of this sound recording for its continued popularity and widespread commercial use.

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even among popular music recordings -- ever qualifies as a "hit". A substantial volume of recorded music is in genres -- such as classical, jazz and gospel -- to which the term "hit," as that word is used with reference to popular music, is essentially alien. Artists and musicians in these genres, along with artists and musicians in the vast bulk of popular music, enjoy "success," if at all, on a far more modest scale. Performance royalties from the countless broadcasts of these recordings would provide deserved and needed income to such artists and musicians.

Such royalties also should be provided to fairly supplement the income of artists and musicians whose recordings no longer sell, but whose songs continue to receive heavy airplay, particularly today when "Classic Rock" has become a major radio format. Digital broadcasters and cable services will continue to earn revenues by offering these recordings to an eager public; what compelling reason is there that the artists of yesteryear should not be compensated when the other half of the musical partnership, the songwriter, continues to profit from their vintage performances.

The creative contributions of recording companies are also deserving of recognition, which Congress has already acknowledged in including sound recordings among copyrightable works. The role of the recording company

begins when it sifts, identifies and selects the talent components that are ultimately consolidated into the finished recording and continues through every stage of the process through the production of the recording and the manufacture, marketing and promotion of the albums, cassettes and CDs.

2. The International Implications of the Absence of a Performance Right in Sound Recordings

The glaring unfairness of this discriminatory treatment is all the more demanding of rectification since the United States, the world's leader in the creation of sound recordings,[10] is one of only a very few western nations that fail to recognize a performance right for sound recordings.[11] This failure is depriving U.S. performers, musicians and recording companies of income from abroad because many nations will not pay sound recording royalties to nationals of countries that do not have reciprocal performance rights. American recording companies, artists and musicians have thus been excluded from royalty pools that distribute performance royalties in excess of $100 million in

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[10] American companies control nearly one half of the $21 billion annual trade in recordings.

[11] Approximately sixty nations, including at least nine European Community member states, grant either producers or performers broadcast and performance rights in sound recordings, either under copyright law or "neighboring rights."

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1989. And the size of these pools will grow exponentially over the coming years as the number of countries that recognize a performance right in sound recordings increases.[12] Unless U.S. law is changed, U.S. recording companies, musicians and artists will continue to be carved out of the royalty pools.

The absence of a performance right in sound recordings also prejudices the position of the U.S. government in international trade and copyright discussions. Promoting high levels of intellectual property protection within both multilateral and bilateral fora is a major trade policy goal of the United States. However, our trading partners naturally question our commitment to such standards when we fail to accord sound recordings the basic protection of a performance right. Just as the United States' reluctance to accede to the Berne Convention once placed U.S. trade negotiators in the awkward position of asking for more copyright protection in the international arena

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[12] In its recent discussion paper on Broadcasting and Copyright in the Internal Market, the European Commission recommended that member states grant a performance right to performers and/or recording companies for digital satellite transmissions of sound recordings. Anticipated from the European Commission is an even broader proposed directive that will recommend that all member states recognize a performance right in sound recordings.

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than afforded at home,[13] the absence of a performance right in sound recordings now similarly frustrates and embarrasses U.S. negotiators. For example, in their efforts to negotiate a model copyright law within the World Intellectual Property Organization, the U.S. has consistently advocated the recognition of sound recordings as a subject of copyright protection. But in debates over the model law, the U.S. delegation has been forced into the untenable position of championing the cause of protecting sound recordings through copyright law while denying that Berne's minima rights should apply equally to sound recordings here at home.

The lack of a performance right in a sound recording under U.S. law and the consequent inability of the U.S. to credibly or forcefully argue that sound recordings are "copyright works" like books and motion pictures, has been used effectively by our trading partners that wish to maintain a low level of protection for sound recordings. This low level of protection can take several forms -- including short term of protection, no retroactivity, application of reciprocity rather than national treatment, and broad limitations of exclusive rights (e.g., exemption for "personal use").

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[13] See H.R. Rep. No. 609, 100th Cong., 2d Sess. 18-19 (1988); S. Rep. No. 352, 100th Cong., 2d Sess. 4-5 (1988).

Whatever the inadequacy, there is a common thread -- the ability to reproduce, distribute or perform U.S. sound recordings without payment.

As long as U.S. law continues to deal with sound recordings as a step-child when compared to other copyrighted works, the U.S. will have difficulty remedying this unfairness that costs U.S. recording industry and the U.S. economy in excess of one billion dollars annually -- a much needed contribution to our balance of trade payments. Furthermore, as long as sound recordings do not enjoy performance rights under U.S. law, the U.S. will be forced to continue to take positions on the non-application of treaty obligations with respect to sound recordings, further eroding the international protection of sound recordings.

This situation completely undercuts U.S. credibility and, ironically, forces the U.S. to take positions on international obligations with respect to sound recordings that make the U.S. recording industry vulnerable throughout the world. Our position is often incoherent and the confusion is unnecessary. These negative international consequences resulting from the status quo are but another reason why sound recording copyright owners should now be granted their long-overdue right of public performance.

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B. The Copyright Office Should Recommend to Congress Legislation Requiring that Digital Audio Broadcast and Cable Services Accurately Transmit All Digital Subcodes Contained in Prerecorded Digital Recordings

We also urge the Copyright Office to recommend legislation requiring that digital audio broadcast and cable services accurately transmit all digital subcodes contained in prerecorded digital recordings. These subcodes will contain a plethora of information that will be useful in identifying musical selections, performing artists, record labels and more.

The most compelling reason for requiring accurate transmission of digital subcodes is the public's interest in being assured that these services will be capable of providing this useful information. Already, at least one digital cable service, Digital Music Express, offers consumers liquid crystal display ("LCD") readouts that display information identifying the musical selection being played, the artist performing the selection and the label on which it was recorded. See Attachment 6. And the International Electrotechnical Commission, the consumer electronic industry's worldwide standard setting body, is already circulating IEC Standard 958, which would establish standards concerning the placement of this data in what is known as the Music Program Production Block. The consumer electronics industry itself thus has

demonstrated its interest in making this information available to consumers. Timely action is required to ensure appropriate configuration of digital broadcast and cable systems and receivers so that such information will be available in the digital audio context.

Opposition to RIAA's mandatory digital subcode transmission proposal in the FCC's proceedings on digital audio broadcasting was grounded on the fear that accurate transmission of digital subcodes may one day facilitate implementation of royalty legislation or compensation systems.[14] For example, the Register of Copyrights has indicated interest in technological systems to ensure appropriate compensation for unauthorized taping of prerecorded works -- which could be impossible without a system that mandates accurate transmission of digital subcodes.[15] Indeed, it is the apparent hope of the opponents of this proposal that the

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[14] One commenter in the FCC proceedings, the Home Recording Rights Coalition, incorrectly stated in this connection that the legislative history of the Sound Recording Act of 1971 establishes that home taping is a "legitimate" practice sanctioned by Congress. Rather than restate the voluminous arguments to the contrary, we refer the Copyright Office to Professor Melville B. Nimmer's authoritative article on this subject: "Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth," 68 U. Va. L. Rev. 1505 (1982).

[15] Digital Audio Tape Recorder Act of 1990: Hearing on S. 2358 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 2d Sess. 29 (1990).

absence of accurate subcode data in digital audio services will frustrate any congressional efforts to legislate a workable royalty system. Such pleas to ignore an opportunity to make a sensible rule at the outset of a new era of digital technology, pleas expressly designed to hamstring Congress, should be rejected.

C. The Copyright Office Should Recommend to Congress Limitations on Multiple-Cut Album Play by Digital Audio Broadcast and Cable Services to Curb Home Taping Abuse

We also urge that the Copyright Office recommend legislative limitations upon the ability of digital audio broadcasters and cable services to play, without appropriate licenses, more than an individual selection of an album within a limited period of time or to offer "artist repertory" programming. Such restrictions would curb abuses of a performance right by eliminating the most blatant inducements to home taping.

The need to prevent abuses of the performance right alone would be sufficient to justify such restrictions, but it is not only the performance right that is implicated by such programming. Some of the activities contemplated by digital audio broadcast and cable services go well beyond the realm of public performances and implicate the record companies' existing exclusive rights of reproduction, adaptation

and public distribution. For example, digital cable services may offer pay-per-listen services, and may be capable of activating an individual's recording equipment in order to facilitate "automatic" home taping. Though such facilitation itself might trigger contributory copyright liability under current law, clear legislative rules in this overall area are essential to prevent abuses of our rights.

V. CONCLUSION

The Copyright Office's report on digital audio broadcast and cable services provides an opportunity for a clearheaded, forward-thinking evaluation of how the copyright law ought to treat these emerging technologies. As the foregoing demonstrates, the current law, long inadequate in its failure to recognize a performance right in sound recordings, does not provide the needed protections to creative incentives in this new environment; legislative changes are required now, while these services are still in their infancy and able to take into account our wishes. We have seen time and time again the difficulties of adjusting copyright rules after extensive business investments in new technologies have been made and consumers have begun to rely on them. Failure to act now may forever foreclose our ability to do so in the future.

Accordingly, the Copyright Office must use the occasion of this report to seek to correct existing inequities and gaps in the law before it is too late to do so. It should not be persuaded by economic arguments from those who benefit from the status quo that "it's always been done this way before." It is precisely that adherence to the "old ways" that will perpetuate unfair treatment for sound recordings and that will prevent the Copyright Office, the Congress, and our international negotiators, from anticipating and correcting strains in the copyright laws caused by these new technologies.

Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION
OF AMERICA
1020 19th Street, N.W.
Washington, D.C. 20036
(202) 775-0101

David E. Leibowitz
Senior Vice President
and General Counsel

December 14, 1990

CERTIFICATE OF SERVICE

I, Kathleen M.H. Wallman, do hereby certify that a true and correct copy of the foregoing "Comments of the Recording Industry Association of America" was delivered by hand, on this 14th day of December 1990, to the following:

The Honorable Ralph Oman
Register of Copyrights
Copyright Office
James Madison Memorial Building
First & Independence Ave., S.E.
Washington, D.C.

Kathleen M.H. Wallman

Kathleen M.H. Wallman

Attachment 1

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules with regard to the Establishment and Regulation of New Digital Audio Radio Services	)	**GEN. Docket No. 90-357**

COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA

1. Introduction and Summary.

On August 1, 1990, the Commission adopted a Notice of Inquiry into the development and implementation of new digital audio radio services.[1] As noted by the Commission, "digital radio services encompass a wide range of technologies and techniques used to provide sound quality much higher than can now be provided by existing AM and FM broadcasting services".[2] Central to all such services is the ability to provide through transmission means compact disc quality audio.

The Recording Industry Association of America ("RIAA") is a

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1 Notice of Inquiry, GN Docket 90-357, FCC 90-281 (1990).

2 Id. at 1.

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not-for-profit incorporated trade association whose members account for more than ninety percent of all authorized prerecorded music produced, manufactured, and distributed in the United States. The RIAA has a direct interest in all means through which sound recordings whose copyrights are owned by its members will be disseminated to the public. And that interest is heightened where enterprises, such as those seeking to establish digital audio services, propose to electronically distribute sound recordings with sound quality equal to that now only available on prerecorded compact discs and, on a more limited basis, digital audio tape (DAT).

The ability to transmit "CD quality" digital audio signals challenges our assumptions about the means of delivering musical entertainment as we approach the 21st Century. Traditionally, we have looked upon the sale of prerecorded music on disc and tape as the primary form of distribution of sound recordings to the public. The copyright law bears the imprimatur of this technology driven, and perhaps soon to be outdated, approach. Digital audio, however, has the potential to destroy the sales market for sound recordings inasmuch as it permits the delivery of a competing product with comparable sound quality and at a lower cost.

The Commission now has the opportunity to ensure that the introduction of digital audio services does not undermine the continued creation of new music for the public's benefit. Therefore, in establishing technical standards and regulatory policies for digital audio services, the Commission must assure

that the interests of the sound recording copyright owners will be protected through the digital audio transmission process. The Commission must also require digital audio services to deliver essential digital subcode information that accompanies digital audio material embodied on prerecorded digital recordings.

Accordingly, the RIAA urges the Commission to condition any approvals granted to digital audio services upon their protection of the rights and interests of the owners of the recorded works that will comprise the very programming of these services. As part of an overall protection scheme, the Commission should prohibit digital audio services from transmitting anything more than an individual selection from a particular album during a limited time period unless they have secured the express consent of the owner of the copyrighted sound recording.

2. Scope of the Commission's Inquiry.

Through its NOI, the Commission has begun "a broad inquiry into all aspect of digital radio service."[3] While the Inquiry principally focusses on issues of spectrum allocation and the impact of digital audio services on existing audio services, the Commission also has sought comment on the "potential ramifications of these potential improvements [in sound quality on audio programming] . . . to the listening public".[4]

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3 Id. at 1.

4 Id. at 2.

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Moreover, the Commission has expressed its desire to "ensure that a digital audio service, if permitted, will best serve the public interest".[5] It is with respect to these two areas that the RIAA offers these Comments.

Unlike analog broadcasting, digital audio services will carry sound frequency information in the form of digital codes. The nature of these transmissions will ensure that there will be no loss of sound quality due to dust, needle or hardware noises. As a result, and as pointed out by the Commission in its NOI, the sound quality available through digital audio services will equal that available on prerecorded compact discs. For the creators of prerecorded music, digital audio services represent a threat to their very existence.

Without adequate protection, these digital audio services could have a devastating impact on the recording industry, and ultimately on the listening public as well. For example, unless subject to certain controls, a digital radio service could transmit an entire album of a popular artist, such as Madonna, on the day of its release, thereby making it available for perfect home copying by Madonna fans throughout the country. One can readily see how this capability could virtually wipe out the economic incentive now afforded to record creators to produce new recordings by eliminating the market for the sale of prerecorded music -- the only existing means for providing compensation to the producers of the recording.

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5 Id. at 2.

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3. Digital Audio Services Have Significant Copyright and Business Implications for the U.S. Recording Industry.

The "cloning" characteristics inherent in digital technology make digital audio services a most serious threat to the recording industry. Since digital audio services will transmit sound recordings with quality equal to that of prerecorded compact discs, they will enable individuals to connect their digital radio receivers to digital recorders such as DAT, to make "perfect clone" copies of prerecorded works. In fact, even recording digital radio transmissions on an analog cassette recorder will provide extremely high quality, nearly perfect, copies.[6] Through the combination of such recording and receiving devices, digital audio services have the potential to become the "electronic record stores" of the future. Moreover,

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[6] Unauthorized copying of sound recordings presently displaces about one-third of the industry's sales. A report released last year by the Office of Technology Assessment concluded that one billion musical pieces are copied every year in this country. U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, D.C.: U.S. Government Printing Office, October 1989) at 154. Of these, the OTA estimates that approximately 439 million tapings were made either from radio or television broadcast sources. Id.

The harmful effects of unauthorized copying hit hardest those on the front lines of the music industry -- including the recording artists, musicians, record companies, recording engineers, and the numerous other individuals involved in the creation, manufacture, and distribution of sound recordings-- whose livelihoods are directly dependent on the sale of prerecorded music. Even conservative estimates of the extent of the damage caused calculate the lost revenues at nearly $1 billion per year. Digital audio services -- which bring the quality of prerecorded music into the home through transmission media -- threaten to significantly exacerbate the problem.

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subscription digital audio services may enable home listeners in the future to "call up" particular sound recording selections at will, thus becoming a "celestial jukebox", perhaps displacing record sales altogether.

4. Digital Audio Services Pose New Challenges for United States' Communications and Copyright Policies.

A U.S. copyright is, in actuality, a "bundle of rights", generally providing copyright owners with the exclusive rights of reproduction, adaptation, public distribution, public performance, and public display.[7] Unlike the owners of all other works protected under U.S. copyright law, however, U.S. copyright owners of sound recordings are not currently afforded the right to control the public performance of their works.[8] Because of this historical anomaly,[9] record companies and their performing

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7 17 U.S.C. Section 106.

8 17 U.S.C. Section 114(a).

9 See, generally, the Report of the U.S. Register of Copyrights, Performance Rights in Sound Recordings, 95th Cong., 2d Sess. (June 1978)(House Jud. Comm. Print No. 15). Therein, in 1978, the Register concluded that a performance right should be granted to copyright owners of sound recordings in light of "considerations of national uniformity, equal treatment, and practical effectiveness":

> Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax". However, any economic burden on the users of recordings for public performance is heavily outweighed...by the commercial benefits accruing directly from the use of copyrighted sound recordings...Sound recordings are creative works, and their unauthorized performance results in both

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artists and musicians receive no compensation for the commercial public performances of their works.[10]

However, several activities contemplated by digital audio services may well go beyond that of public performances. For example, digital audio services may offer subscription or pay-per-listen services, and may utilize "smart cards" to decode encrypted digital audio signals. Moreover, some digital audio services may be capable of activating an individual's recording equipment in order to facilitate individual copying without the need for human intervention.

One or more of these above-mentioned activities will implicate the record companies' exclusive rights of reproduction, adaptation, and/or public distribution, and unless authorized,

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> damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

Id. at 1063. The above-quoted passage was written before the development of the new digital transmission and recording technologies now at issue. Undoubtedly, the rationale for granting a performance right to sound recording copyright owners in today's environment is even more compelling than it was in 1978.

[10] It should be noted that the absence of a public performance right with respect to digital audio transmissions has now caught the attention of Congress. Specifically, Senator Dennis DeConcini, Chairman of the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks, has written to the Register of Copyrights requesting that the U.S. Copyright Office "conduct a study to determine how the rights of copyright owners of sound recordings and performers are protected with respect to digital audio transmissions." Letter from Sen. Dennis DeConcini to Mr. Ralph Oman (July 25, 1990). The RIAA understands that the Copyright Office has begun work on developing this study.

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could subject digital audio services to liability for copyright infringement.

Accordingly, any approvals granted to digital audio services by the Commission should require the services to fully protect the copyright interests of record producers and their recording artists through the acquisition of licenses from the copyright owners of the sound recordings they transmit.[11]

As part of an overall protection scheme, the Commission should prohibit digital audio services from transmitting anything more than an individual selection from a particular album during a limited time period unless they have secured the express consent of the owner of the copyrighted sound recording.[12] The Commission's authority to establish such content-neutral regulations governing digital transmissions is clear. In fact, the Commission adopted a similar regulatory system in 1972 when,

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[11] The Commission also should recommend to Congress that the U.S. Copyright Law be amended to remove the historical anomaly by granting sound recording copyright owners a public performance right.

[12] The Commission may wish to also consider imposing similar restrictions on: (1) the transmission of concert performances made from unauthorized "bootleg" sound recordings; and (2) digital cable audio ventures including the "Digital Music Express", "Digital Cable Radio", and the "Digital Planet".

It should be noted that even the unauthorized digital transmission of individual selections can itself have a significant financial impact on the growing "cassette singles" market within the recording industry. For example, during the first six months of 1990 over 45 million prerecorded cassette singles were marketed in the United States with a suggested retail list dollar value of over $133 million.

through its "syndicated program exclusivity rules"[13], it restricted the right of cable television systems from retransmitting certain syndicated programming broadcast by distant television stations. Significantly, the Commission established these rules notwithstanding the "legality" of such retransmissions under the then applicable copyright law.[14] Section 76.151(a) of these rules provided the "copyright holders of syndicated programs" with the right to object to the distant importation of their programs even where no local television station had acquired local broadcast rights.[15] Part of the rationale for this rule was to afford to the copyright owner the opportunity to more fully exploit its rights in the program despite the absence of copyright liability governing cable's retransmission activity. Indeed, these rules have been referred to "as proxies for the copyright liability the courts had refused to impose".[16]

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13 Former 47 CFR Section 76.151 through 76.155 (1972).

14 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). As with its current NOI concerning digital audio systems, the Commission in 1972 was dealing with an industry that had yet to mature. The full development of proper legal norms governing cable's activities needed time to evolve, and the FCC's cable rules served as the foundation for this development. The Commission can and should serve the same purpose here.

15 The standing of these copyright holders to secure exclusivity protection was set forth under former 47 CFR Section 76.153(a).

16 Malrite T.V. of N.Y., et al. v. F.C.C. & U.S., 49 R.R.2d 1127, 1131 (1981). See also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 177, reprinted in U.S. Code Cong. & Ad. News

By providing exclusivity protection for sound recordings, the Commission would be serving several important public interests. First, it would affirm the incentive necessary for record companies to produce new recordings by preserving their opportunity to sell prerecorded material to the public and to profit from new forms of commercial exploitation.[17] Second, it could allow for the development of "legitimate" electronic distributors of sound recordings in the future. Finally, it could enhance both competition and diversity in the digital audio industry.

5. Digital Audio Services Should Be Required to Transmit All Digital Subcode Information Contained in Prerecorded Digital Recordings in Intelligible and Usable Form.

The RIAA also has technical concerns relating to whether digital audio services will fully disseminate digital subcode information that may be embodied on prerecorded digital recordings. Digital recording technology enables record companies to complement the audio sound recording through the delivery of data contained in digital subcodes in prerecorded digital recordings. At present, two types of data are

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5792, wherein the House Judiciary Committee during the 1976 Copyright Law Revision stated that "the syndicated [and sports] program exclusivity rules of the FCC have the effect of protecting copyright owners by restricting the cable carriage of certain distant television programming".

[17] The unintended elimination of this incentive through unrestricted digital transmissions could deprive both analog and digital broadcasters of new musical works for the listening public's pleasure.

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anticipated.

First, future digital receivers are expected to include LED read-out screens to display alphanumeric information. Record companies anticipate using this capability to display listener information relating to the particular sound recording including details about the recording artists, songs, album liner notes, tracking times, etc.

Second, technical information included in the subcode is essential for various purposes. Information falling into this category includes copyright data (for example, name of copyright owner, year of first publication, country of origin), the International Standard Recording Code (ISRC), which identifies particular tracks of recorded music, and data related to the Serial Copy Management System (SCMS) included in digital audio tape (DAT) recorders now being marketed world-wide. The proper dissemination of this information will be critical in the future for the protection of specific copyrights; the proper functioning of DAT recorders; identifying, monitoring, tracking and accounting for certain music uses; and the collection and/or distribution of royalties related thereto.

Given the critical nature of this information, the Commission should require digital audio services to accurately transmit all digital information, including subcode information, embodied in prerecorded digital recordings in intelligible and usable form.

6. Conclusion.

Central to any audio transmission service, whether analog or digital, are the sound recordings that are delivered to the public for their listening pleasure. Without adequate and effective protection for the copyright owners of these sound recordings, the livelihoods of recording artists, musicians, record companies, recording engineers, and the numerous other individuals involved in the creation of sound recordings are placed in jeopardy.

The advent of digital audio services, in conjunction with recording equipment allowing the "cloning" of prerecorded music, represents an entirely new threat to the recording industry. We must abandon our traditional view of the relationship between broadcast and sale of prerecorded music with a view toward a future in which transmissions may be the principal form of commercial exploitation. Under these circumstances, it is clear that due consideration must be given to the interests of the copyright owners of prerecorded music in the development of new forms of exploitation of their works.

Digital audio services pose new challenges to the copyright protection of sound recordings and the protection of other vital interests. These systems, unless properly regulated, could have dire consequences for the U.S. recording industry.

It is in the long-term interests of the United States to assure that the supply of sound recordings continues to be

abundant in the future.[18] Unfortunately, commercial audio transmission venturers, driven by short-term profits, may be tempted to dismiss these important public policy interests. The Commission must assure that our long-term interests are not lost in the process.

The Commission is at a crossroads created by the interplay of law, the market, and advances in technology. Down one road lies opportunity of unparalleled dimension for the creation and distribution of entertainment to the public. Down the other lies an unregulated industry in which digital audio systems undercut the market for the sale of prerecorded music, resulting in the severe contraction, if not worse, of the recording industry. The Commission needs to carefully explore the means of adequately protecting the interests of copyright owners, and of thereby providing incentives for the creation of new music. The alternatives are deafening.

Accordingly, the RIAA recommends that the Commission proceed cautiously in establishing digital audio services and assure that

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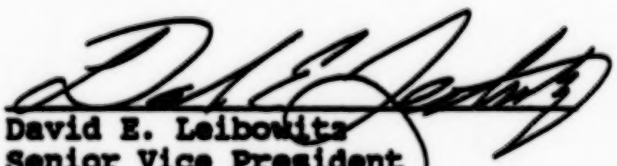
[18] A vital U.S. sound recording industry also has significant trade implications. The public world-wide has an insatiable thirst for U.S. sound recordings. Currently, the international market represents 40% of sales of U.S. sound recordings, totalling approximately $4 billion. These international sales of U.S. recordings result in a significant positive trade balance. As digital audio transmission systems are considered throughout the world, the United States regulatory policy for protecting these works will have broad international implications as well. The Commission should seize the opportunity now offered through its NOI to establish a global model system protecting the interests of the creative community while providing the public with a continued flow of new and abundant music works through digital means.

any approvals granted to such services are conditioned upon their protection of the rights and interests of the owners of the recorded works that will comprise the very programming of the CD Radio system. Specifically, any approvals granted to digital audio services by the Commission should require the services to: (1) fully protect the copyright interests of record producers and their recording artists through the acquisition of licenses from the copyright owners of the distributed sound recordings, particularly with respect to its transmission of anything more than an individual selection from a particular album during a limited time period; and (2) accurately transmit all digital information, including subcode information, embodied in prerecorded digital recordings in intelligible and usable form.

Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION
OF AMERICA
1020 19th Street, N.W.
Washington, D.C. 20036
(202) 775-0101



David E. Leibowitz
Senior Vice President
and General Counsel

October 12, 1990

CERTIFICATE OF SERVICE

I, NEIL DONAHUE, do hereby certify that a true and correct copy of the foregoing "Comments of the Recording Industry Association of America" was delivered by hand, on this 12th day of October 1990, to the following:

Donna R. Searcy
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Neil Donahue

Attachment 2

OFFICE OF THE GENERAL COUNSEL

RIAA

December 14, 1990

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1010 M Street, N.W.
Washington, D.C. 20554

Re: Amendment of the Commission's Rules With Regard to the Establishment and Regulation of New Digital Audio Radio Services (General Docket No. 90-357)

Dear Ms. Searcy:

Submitted herewith for filing are an original and ten (10) copies of the Recording Industry Association of America's comments in the above-captioned rulemaking proceeding.

The enclosed reply comments are being submitted pursuant to the Commission's October 17, 1990 Federal Register notice.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

RECORDING INDUSTRY
ASSOCIATION OF AMERICA

By _____
David Leibowitz
Senior Vice President
and General Counsel

Enclosure

1020 Nineteenth Street, N.W. ■ Suite 200 ■ Washington, D.C. 20036 ■ Phone: (202) 775-0101 ■ Fax: (202) 775-7253

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	GEN. Docket
with regard to the Establishment	)	No. 90-357
and Regulation of New Digital Audio	)	
Radio Services	)	

REPLY COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA

I. INTRODUCTION

On October 12, 1990 the Recording Industry Association of America ("RIAA") submitted comments in response to the Commission's Notice of Inquiry concerning the development and implementation of new digital audio broadcast services.[1] Several commenters subsequently submitted comments addressing issues raised by RIAA. Continental Satellite Corporation ("CSC") endorsed an exclusivity proposal similar to RIAA's proposal (CSC Comments at 3-4). Frederick L. Spaulding, P.E. also expressed a position consistent with RIAA's views, urging the Commission to consider restrictions on the "delivery to the home of CD-quality material." (Spaulding Comments at 2-3.)

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[1] These comments are submitted pursuant to the Commission's October 17, 1990 Federal Register notice extending the deadline for reply comments to December 14, 1990. 55 Fed. Reg. 42,028.

By contrast, the National Association of Broadcasters ("NAB") and the Home Recording Rights Coalition ("HRRC") took issue with the proposals advanced by RIAA. We respond to those comments in this submission.

In a nutshell, NAB and HRRC, along with Westwood One Stations Group ("WOSG") (and other broadcast interests also represented by Kaye, Scholer, Fierman, Hays and Handler, counsel to WOSG), exhort the Commission not to treat digital audio broadcast services any differently than current radio broadcast services.[2] The Commission is past that point in its thinking, however, as its Notice of Inquiry clearly indicates. Digital audio radio[3] is a brand new technology with far-reaching implications for many affected industries,

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[2] Predictably, the broadcast interests argue especially strongly for the status quo, urging, for example, solicitude for "localism" when their real concern is protection of their commercial interests. Similarly, at the core of the broadcast industry's arguments against RIAA's position is their fear that they may actually have to pay for one of their key "supplies" -- the recording industry's product.

[3] The Copyright Office has published a notice of inquiry seeking comments on certain aspects of digital audio broadcast and cable services. 55 Fed. Reg. 42,916. As is evident from RIAA's submission in that proceeding, a copy of which is attached, many of the concerns and arguments that pertain to digital audio broadcast services also apply to digital cable services, and the Commission should regulate them in the same fashion insofar as their use of sound recordings is concerned.

including the recording industry, as well as the listening public. Judicious consideration of those implications is essential to ensure that the public interest and other affected interests are fairly treated.

That is what RIAA seeks for its members in this proceeding: fairness. We urge the Commission not to rush toward implementation of an audio broadcast service in the new digital domain that will perpetuate -- and, indeed, exacerbate -- the anomalies and unfairnesses of the current analog audio broadcast system.

To this end, in our October 12 submission, we urged the Commission to take two specific steps to ensure that the recording industry's copyright interests would be adequately protected in the new digital audio broadcast regime and thereby ensure that the public will continue to benefit from the diversity and abundance of creativity induced by the rewards of copyright protection. First, we suggested that the Commission prohibit digital audio services from transmitting anything more than an individual selection from a particular album during a limited time period unless the services have secured the permission of the owner of the copyrighted sound recording. (RIAA Comments at 8-10.) We pointed to the Commission's "syndex" rules as a precedent for the imposition of such content-neutral

broadcast restrictions. Second, we urged that digital audio services should be required to transmit all digital subcode information contained in prerecorded digital recordings in intelligible and usable form. (RIAA Comments at 10-11.) We identified several public and consumer interest purposes that such a requirement would serve.[4] HRRC and NAB have taken issue with both of these proposals. For the reasons explained below, their objections lack merit.

II. RIAA's Proposed Prohibition on Multiple Cut Album Airplay is Justified on the Same Basis as the Commission's Syndex Rules

NAB criticized our proposal to prohibit multiple album cut airplay and attempted to distinguish the "syndex" rules on two grounds. First, it asserted that, in contrast to RIAA's proposal, the syndex rules were justified because they were necessary to remedy an unfairness: "'the broadcasting industry spent billions of dollars to create and purchase programming, [while] cable operators could retransmit those programs at their operating cost without making any payments to their program suppliers'." NAB Comments at 27 (quoting Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir.

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[4] We also urged the Commission to recommend that Congress grant a performance right in sound recordings. Please refer to our attached comments in the Copyright Office proceeding for an elaboration of our views on this issue.

1981), cert. denied sub nom. National Football League v. FCC, 454 U.S. 1143 (1982)). This attempted distinction is both unavailing and amusing. With minimal editing, the quoted sentence would aptly describe the situation in which the recording industry finds itself vis-a-vis the broadcasters. The real point is that NAB apparently favors "fairness" only when it is on the receiving end.[5] Moreover, the syndex rules applied to protect copyright owners even in those circumstances where a local station had not "spent billions . . . to purchase programming."[6] In such circumstances, the effect of the rule was to protect the copyright owner's ability to market its work through its normal channels despite the absence of copyright liability governing the cable retransmissions at issue there. That is all RIAA seeks here. The absence of a performance right in a sound recording does not prevent the Commission from taking similar action here. At issue in both instances is the effort to

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[5] It is ironic that broadcasters, while seeking to perpetuate their free use of our sound recordings, are simultaneously urging Congress to require cable systems to compensate them for cable's retransmission of local broadcast signals (the so-called "if carry, must pay" proposal).

[6] See 47 C.F.R. §§ 76.151(a), 76.153(a) (1972).

protect the source of programming that drives these broadcast services.[7]

Second, NAB asserts that our proposed rule is beyond the FCC's jurisdiction over communications policy. To the contrary, it is difficult to conceive of what could be more squarely within the Commission's jurisdiction than a rule establishing reasonable conditions of broadcast for a new service and for the very works that will comprise the programming for this service. The protection of affected copyright interests and the resultant prevention of damage to the creative incentive purpose of copyright protection provide no grounds for concluding that adoption of our proposed rule is beyond the jurisdiction of the Commission. Communications policy should not be made in a vacuum and often does take into account the copyright or economic interests of persons affected by communications policy issues. The Commission's history is full of such examples.[8]

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[7] The recording industry's investment in each and every recording that reaches the public is substantial. Most releases are not profitable, however. Only about one of every six recordings breaks even; yet a smaller fraction achieves the status of "hits." It is the profits from these successes that sustain the industry and make possible continued investments in new recording projects, new talent and less profitable genres such as jazz.

[8] The Commission's syndex rules are one example of

[Footnote continued on next page]

NAB also argues that our proposal raises "serious First Amendment questions," apparently referring to the impediment it would create to the broadcast industry's commercial exploitation of the recording industry's product. This is no surprise. Copyright users frequently attempt to wrap themselves in the first amendment when they want to use copyrighted material without permission from or compensation to the owner.[9]

[Footnote continued from previous page]
Commission action authorized by its jurisdiction over communications policy issues that has copyright protection implications. See United Video, Inc. v. FCC, 890 F.2d 1173, 1184 (D.C. Cir. 1989) ("[T]he 1976 Congress did not imagine copyright law and communications law to be two islands, separated by an impassable sea.") Other examples include the Commission's exclusivity rule on sports broadcasts, 47 C.F.R. § 76.67, and the Commission's withholding, at the behest of the Executive Branch, of § 214 authorizations to satellite resale carriers to deliver superstations for retransmission by Canadian cable systems until adequate copyright safeguards for program suppliers are in place. See Letter from Chairman Mark Fowler to Ambassador Diana Lady Dougan (August 6, 1984).

Further, the Communications Act itself legislates in areas in which communications policy affects copyright interests. See, e.g., 47 U.S.C. § 605(a) (prohibiting unauthorized interception of certain broadcast, satellite and other signals) and 47 U.S.C. § 325(a) (prohibiting the unauthorized broadcast of broadcast signals).

[9] See P. Goldstein, Copyright § 10.3 (1989) (citing, inter alia, Roy Export Co. v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095 (2d Cir.), cert. denied, 459 U.S. 826 (1982); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); Wainwright Secs., Inc. v. Wall Street Transcript Corp., [Footnote continued on next page]

It is, however, a specious argument. There is no first amendment right "to make commercial use of the copyrighted work of others." United Video, Inc. v. FCC, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (upholding syndex rules against, inter alia, first amendment challenges). And, curiously, the broadcast industry discerned no such infirmities in the syndex rules that it sought and secured.

III. Mandatory Transmission of Accurate Digital Subcodes is in the Public Interest

HRRC took issue in its comments with our proposal that the Commission require digital audio broadcasters to transmit all digital subcode information contained in prerecorded digital recordings in intelligible and usable form.[10] HRRC's position is surprising, given its support of similar provisions, which it helped draft, in S. 2358 and H.R. 4096, the Digital Audio Tape Recorder Act of 1990. It explains its turnabout by saying that

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[Footnote continued from previous page]
558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974)).

[10] The subcodes contain information integral to the copyrighted sound recording that identifies the track, artist, label, etc. See WGN Continental Broadcasting v. United Video, 693 F.2d 622 (7th Cir. 1982) (teletext material in the vertical blanking interval of television signal was intended to be viewed with and as an integral component of television news program, and therefore must be transmitted by common carrier along with program to avoid copyright infringement liability).

RIAA's submission to the Commission, in contrast to the proposed legislation, contained no safeguards that would require recording companies to encode their products accurately so as not to claim copyright protected status for works not entitled to such status. Such concerns are easily disarmed: RIAA would have no objection to a regulatory provision requiring accurate encoding of digital subcodes on prerecorded digital recordings.

The most compelling reason for promulgating a digital subcode transmission rule is the public's interest in being assured that the systems will be capable of providing this useful information on the programming offered via digital audio services. Already, at least one cable service, Digital Music Express, offers consumers liquid crystal display ("LCD") read-outs that display information identifying the musical selection being played, the artist performing the selection and the label on which it was recorded. And the International Electrotechnical Commission, the consumer electronic hardware industry's standard setting body, is already circulating IEC Standard 958, which would establish standards concerning the placement of this data in what is known as the Music Program Production Block. The consumer electronics industry itself thus has demonstrated its interest in making this information available to consumers. In order to ensure

that such information will be available in the digital audio arena, the Commission must act now to require appropriate configuration of digital audio systems and receivers.[11]

The difference between RIAA's position on this point and the HRRC's view boils down to this: RIAA urges the Commission not to pass up an opportunity to adopt a sensible new rule at the outset of a new era in broadcasting so as to protect the public interest and the recording industry's existing and evolving copyright interests, as well as preserving options for the future. HRRC implores the Commission to foreclose those options because it fears that accurate transmission of digital subcodes may one day facilitate implementation of royalty legislation or compensation systems.[12] For example, the Register of Copyrights, Ralph Oman, has indicated interest in technological systems to ensure appropriate compensation for unauthorized taping of prerecorded works -- which could be impossible without a

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[11] Similarly, the Commission is now exploring standards for High Definition Television.

[12] HRRC incorrectly states, in this connection, that the legislative history of the Sound Recording Act of 1971 establishes that home taping is a "legitimate" practice sanctioned by Congress. Rather than restate the voluminous arguments to the contrary, we refer the Commission to Professor Melville B. Nimmer's authoritative article on this subject: "Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth," 68 U. Va. L. Rev. 1505 (1982).

system that mandates accurate transmission of digital subcodes.[13] Indeed, it is HRRC's apparent hope that the absence of accurate subcode data in digital audio broadcast services will frustrate any congressional efforts to legislate a workable royalty system. The Commission should reject pleas for inaction expressly designed to hamstring Congress.

HRRC also argues against mandatory transmission of digital subcodes on the ground that the marketplace should be allowed to work and that broadcasters should be free to make their own choices in the marketplace as to whether to transmit the subcodes. But the marketplace works only when all the actors are on even footing. If it worked in this case, the recording industry would not need to ask the Commission to protect its copyright interests. Ideally, negotiations with broadcasters should occur and result in agreements that include reasonable provisions concerning the transmission of subcodes. But because of historical anomalies in the copyright law, we currently lack the performance right in sound recordings that would afford us equal footing in the marketplace -- hence the

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[13] Digital Audio Tape Recorder Act of 1990: Hearing on S. 2358 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 2d Sess. 29 (1990).

necessity of seeking the Commission's action on the two points that we have raised.

The Purported Commercial Benefits of Digital Audio Broadcast to the Recording Industry are Unproved and Irrelevant

We also reject HRRC's argument that the recording industry ought to be thankful for the advent of digital audio broadcast services and the increased sales that will result from this new way of exposing the public to our product. HRRC's argument is essentially twofold: first, that radio has always been "free" and that there is no reason to diverge from the old rules toward a system that would remunerate copyright owners for the use of sound recordings; and second, that there is no proof of "harm" that will flow from the new service.

As to the first point, we submit that, to the contrary, this is the moment to update the old rules in this new context and infuse them with the fairness that they have always lacked. As to the second point, we doubt that any data, no matter how meticulously collected and documented, would persuade our adversaries of the harm involved here.[14] For example, their

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[14] Moreover, the notion that "harm" is a necessary condition for giving protection to creative works has itself been referred to as an "unhistoric interloper" by then Register of Copyrights David Ladd. "The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture," 30 J. Copyright Soc'y 421, 422 (1983).

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citations to the most recent study of public taping habits, released last year by the Office of Technology Assessment,[15] manage to overlook the study's finding that approximately 439 million unauthorized tapings of prerecorded works were made in this country from broadcast sources in the one year period before the survey -- before the advent of digital audio broadcast.[16] But what is undeniable is the fundamental unfairness that would inhere in allowing new digital audio broadcast services to exploit our product commercially without limitation. The modest proposals that we have advanced for the Commission's consideration would be significant steps toward mitigating that unfairness. At the dawn of a new era in broadcasting, it is imperative that the Commission adopt appropriate ground rules that protect equity and preserve the exciting opportunities that this new era portends for all affected parties.

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[15] U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, D.C. U.S. Government Printing Office, October 1989).

[16] Id. at 154. HRRC's comments also overstate the study's conclusions in asserting that "OTA found [that] the negative economic impact to society from outlawing home taping far outweighs the potential losses . . . ." HRRC Comments at 6. More accurately, one of three contractors hired by OTA so concluded "at least for the short term." Id. at 191. The long-term effects were deemed less certain. Id. at 207.

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Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION
OF AMERICA
1020 19th Street, N.W.
Washington, D.C. 20036
(202) 775-0101

David E. Leibowitz
Senior Vice President
and General Counsel

December 14, 1990

Attachment 3

Digital Cable Radio

Uninterrupted Commercial-Free CD Quality Music

It's a musical revolution. Uninterrupted, commercial-free, CD quality music on your stereo whenever you want it, 24 hours a day. With almost twice the dynamic range of broadcast radio, DCR delivers what FM can't – true CD quality sound. You get the hottest hits, the greatest classics, the biggest names, the most famous orchestras... all yours to enjoy, hour after uninterrupted hour. And you don't even need a CD player.

Select the music you want. DCR offers up to 24 channels, each with a different sound – rock, jazz, classical, country, easy listening, and many more. Whatever you select, you get continuous wall-to-wall music. No commercials. No DJ's. No traffic reports. No bad jokes. Just the music you love, all day and all night.

You've Already Wired For CD Quality Music

Your home is already wired for CD music. Because DCR comes directly over your existing cable TV line. With the service you get a special DCR receiver. It plugs into your cable outlet and connects directly to your stereo.

DCR drives your system to its maximum performance with sound far superior to anything traditional broadcast radio can deliver. You get clear, distortion-free sound with the fidelity and dynamic range of a CD, hour after hour, day after day.

Whether you put a lot into your sound system or not, you get a lot more out of it with Digital Cable Radio.

The Music You Want When You Want It

You get the latest artists, the newest albums, the hottest rock, the coolest jazz the most exuberant conductors and most acclaimed orchestras. Plus classic selections featuring thousands of classics, and classic hits, that are now being re-released on CD.

DCR is completely uninterrupted. Each channel presents a wide range of artists and styles, so you're always hearing something new. For recording convenience, you're still the musical of special live concerts, album presentations of artist spotlights.

Here there's no need to put up with annoying radio commercials. And no need to maintain a CD library. DCR is the music you want, when you want it. Whether it's for serious listening, reading, studying, working or entertaining friends, you get the music, and the quality, you want.

8 Great Music Channels For Just $6.95!

DCR/BASIC includes eight full-time channels, each dedicated to a single style of music. There's one that's perfect for the mood you want to create. Choose from Light Favorites, The Hit List, Country Music, Golden Oldies, Urban Contemporary, The Rock Channel, New Age/Modern Jazz, and Classical. (See other side for more information.)

16 Great Music Channels PLUS Cable TV Audio For Just $11.95!

DCR/PLUS includes 8 additional music channels (for a total of 16), PLUS CD quality sound for many of the cable TV music channels and premium services.

In addition to DCR/BASIC you get: Easy Listening, Big Band/Jazz, Classic Rock, Heavy Metal Rock, Romantic Interludes, The Children's Channel, Modern Latino, and The Gospel Music Channel. (See other side for more information.)

CD Quality Music For Less Than The Price Of One CD!

You won't find a better sound value anywhere! DCR/BASIC is just $6.95 a month! 8 channels of CD quality music, 24 hours a day, 7 days a week. That's less than a penny an hour. DCR/PLUS is just $11.95 for 16 channels, PLUS cable TV audio.

FREE Installation!

We're sure that you'll love Digital Cable Radio. We're so sure we're even suspended our installation fees just to give you a better chance to experience DCR. So go ahead. Installation is "on the house." Enjoy DCR/BASIC for one month for just $6.95. DCR/PLUS is only $11.95!

Connect with the best entry money can buy. Just call:

1-800-I-LOVE-CD.

9am to 11pm Central Time

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SPECIAL PROGRAMMING

Exciting as they are, DCR/BASIC and DCR/PLUS are just the beginning. Our innovative special programming will help you build a more solid, ongoing relationship with your subscribers. Each one will come to see DCR as the fresh, unusual and very personal entertainment medium that it is. Each will feel as if their favorite DCR channels were created just for them.

Cable TV Simulcast - Now cable television can offer another distinct advantage over broadcast -- digital sound for your music TV and premium TV services. DCR enhances the viewing experience of your pay television subscribers, maximizing their enjoyment and minimizing churn. With DCR you add a whole new dimension to the cable television experience ... the dimension of pure sound. With DCR, the best programming just keeps getting better.

Album Hours - Many DCR channels will feature Album Hours during which an entire CD will be played from beginning to end, uninterrupted. This will be an ideal opportunity for fans to record the work of a favorite artist from the finest quality audio available. The quality will be the same as recording off their own CD player.

Artist Tributes - Similar to Album Hours, Artist Tribute programming will feature a particular artist or performing group. Tributes may be programmed as "Most Requested Favorites" or "Rare Recordings" or as a chronological survey of an artist's work. The Golden Oldies Channel, for instance, will feature Elvis Tributes, while The Classical Channel will feature the early works of Mozart.

Special Interest - Special events programming will focus on particular eras or styles, as the Baroque Period in Classical music, Doo-Wop Oldies, Dixieland Jazz, etc. Special holiday music will also be programmed when appropriate.

Concerts - DCR will be able to provide live digital audio simulcast of major concerts and musical events as well as dance, opera and musical theatre presentations. From Springsteen to Pavarotti, from "Aida" to "Les Miserables," DCR will be there with crystal clear digital audio simulcast.

Local Concerts - Because of DCR's flexible technology, local origin programming is also possible. A local symphony or rock concert can easily be presented over DCR alone, or as a joint venture simulcast with a local radio station. The possibilities are endless.

Local FM Radio - including non-commercial Public Broadcasting Stations could be offered over DCR. The superior reception and enhanced geographic distribution appeals to all parties. With the growing number of digital FM stations, programming like this becomes more attractive every day.

Attachment 4

What are the key technical features of the Digital Planet?

DIGITAL PLANET represents leading edge technology and offers a wide range of features:

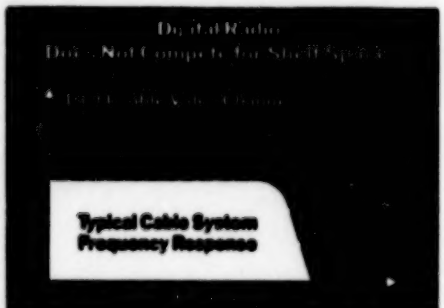
- **91 digital audio channels**
- **Full CD fidelity including a very robust and unique bit error correction technique**
- **Full addressability for security and pay-per-listen album distribution**
- **Friendly tape recorder interface**
- **Remote control**
- **52 channels of data transmission**

How good is the quality of the music and how does it compare with normal FM radio?

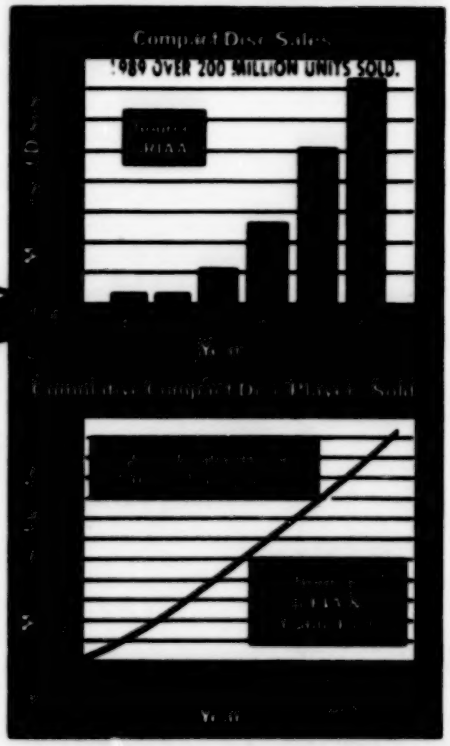
Normal FM radio transmission is an analog process which is limited to 15khz audio bandwidth and subject to noise and distortion caused by atmospherics, signal processing and multipath reception effects. Although a number of FM stations advertise that they are playing CD's, there is only a slight improvement in the quality because of the distortion and noise. DIGITAL PLANET has fidelity which is indistinguishable from normal CD quality since the transmission is in a digital format.

Will Digital Planet have problems getting cable systems to carry the service since they now have no spare channel capacity?

DIGITAL PLANET has developed a technology that utilizes spectrum that is not usable for video services. Every cable system in the country now has room for DIGITAL PLANET programming.



Adaptive Equalization Technology Makes Digital Radio Possible.

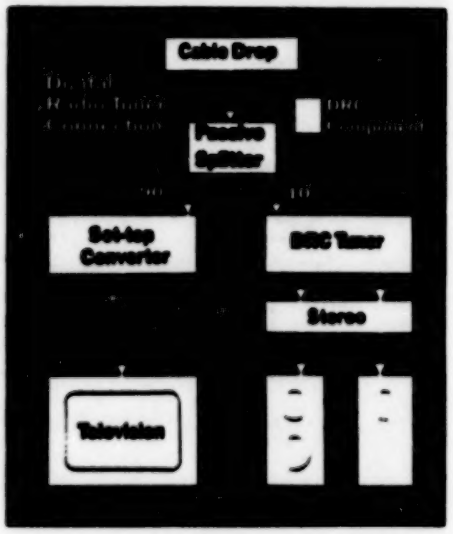


What does the Digital Planet tuner cost?

The DIGITAL PLANET tuner offers the very finest, state-of-the-art electronics. Thanks to the increased demand for sophisticated integrated circuits, the cost for components has reduced production costs. Therefore with qualification, our tuner can be purchased for under $2.50 per month. The tuner is provided with a kit, including the tuner, a splitter, leads and an instructional video with simple directions and diagrams to guarantee ease of installation.

How will Digital Planet maintain security of the encryption system given the current Pay TV piracy problems?

DIGITAL PLANET's defense is to make the system unattractive to pirates by using custom integrated circuits, the latest digital encryption techniques, maintaining tight control of the inventory and re-initializing the individual tuners at least once each month.



What does the research say about the growth of video equipment?

More than 25% of cable subscribers now own a CD player. And CD players sales continue to skyrocket. In our recent A.C. Nielsen survey, another trend was revealed: 70% of cable owners have their television in the same room as the stereo. This represents a high percentage of subscribers who can take advantage of the simulcast feature of DIGITAL PLANET. A trend was also evidenced by the increase in consumer purchases of entertainment centers for the home, with the video and audio products combined. 22% of cable stereo owners have invested over $1,500 in their stereo systems alone.

Digital Planet Promotional Materials

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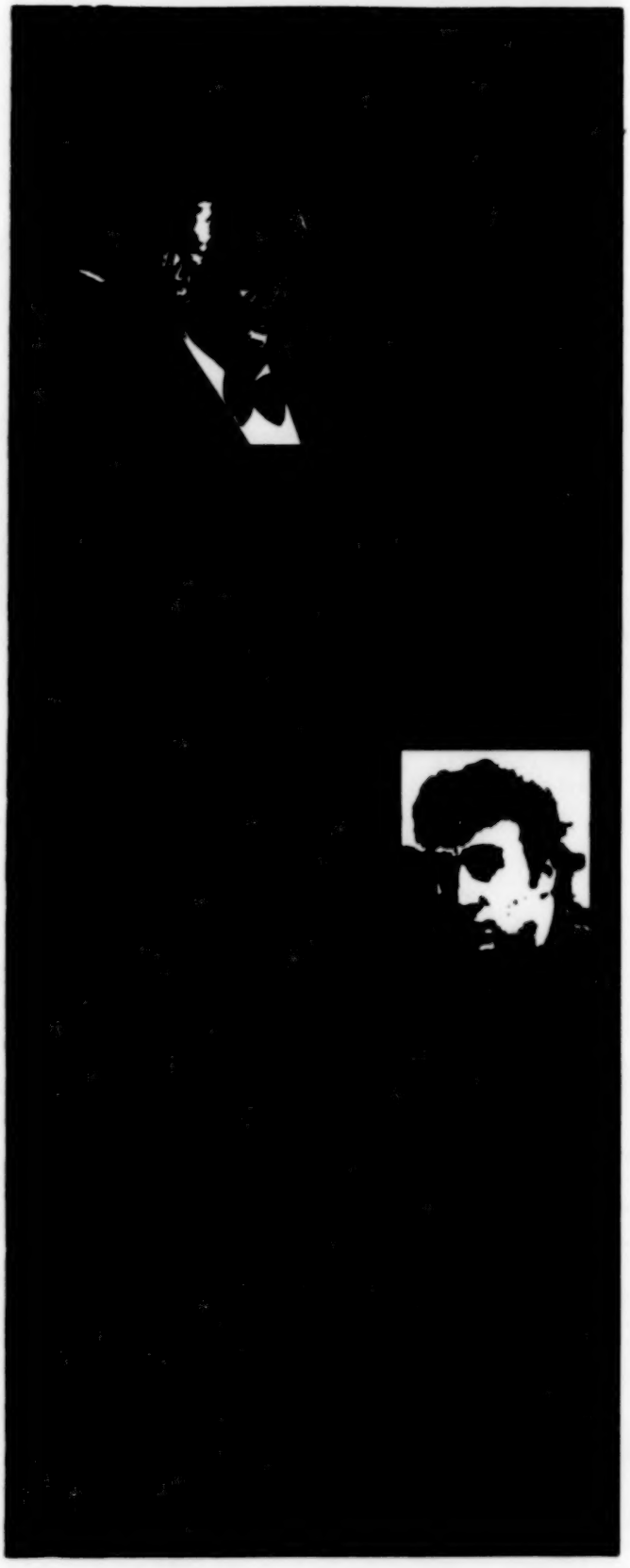
FAST FORWARD



SOUND STREAMS

Recording Simulcasts With Your HiFi VCR

As a subscriber, you're aware that Digital Planet provides quality digital simulcasts of great premium movie and music video cable services, such as HBO and MTV. But you may not be aware that if you own a VCR that has a VHS HiFi sound option, you can produce remarkably good recordings of these simulcasts because your VCR has a typical frequency response of 20Hz to 20kHz and a dynamic range better than 90 dB.

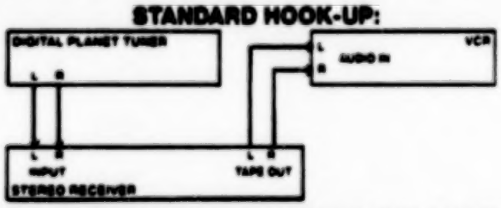
To successfully record these simulcasts, however, there are several important steps you must take:

First, put your VCR into the Simulcast Mode. This is accomplished on most units by moving the INPUT SELECT switch to the SIMULCAST position. (The Input Select switch selects between External [EXT], Simulcast [SIMUL], and the VCR's internal TV channel selector.)

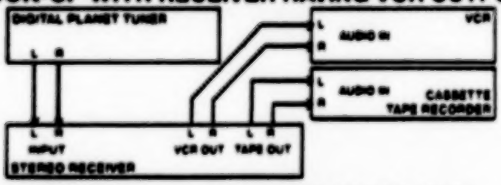
Second, connect your VCR's left and right audio inputs to the audio outputs on your Digital Planet tuner. This can be accomplished through a variety of possible connections, as shown in the diagrams. The connection you'll need to make will depend on your particular stereo equipment configuration. Some stereo receivers have multiple tape outputs that can be utilized with VCRs and cassette tape recorders, while others may only have one set of tape-out jacks. In situations where this jack is in use with your regular tape recorder, you can purchase an adapter at Radio Shack (phono jack #274-303) so that you can be permanently set up to record simulcasts without having to rearrange your stereo plugs.

Third, consult your VCR operations manual for simulcast recording instructions. This will help assure the best possible results.

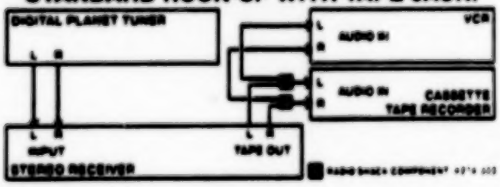
STANDARD HOOK-UP:



HOOK-UP WITH RECEIVER HAVING VCR OUTPUT:



STANDARD HOOK-UP WITH TAPE JACK:



There's one more important thing to remember: **Switch your VCR out of the Simulcast Mode when you're finished recording.** Why? Because the next time you try to tape a TV program in the normal mode, you'll be recording the wrong audio.

If you have any further questions about how to record and enjoy Digital Planet's simulcasts, give us a call or write to us at our Carson, California address.

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Attachment 5

Multichannel News

NJ Standard

Digital Audio Tuners Benefit From Cable's Past Mistakes

By GARY KIM

ATLANTA — Preparing for volume production this spring of tuners for the Digital Music Express (DMX) digital audio service, Scientific-Atlanta Inc. engineers are trying to avoid some of the problems created when cable TV first began using set-top converters.

Initially, converters were simple tuning devices required because TV sets didn't have the ability to locate all the channels a cable system could carry. Later, addressability and signal-scrambling functions were added to the set-top, a move that complicated the in-home electronics environment and led to interest in broadband delivery systems such as interdiction.

So one of the decisions S-A reached early on was to build a product fully compatible with the Sony-Philips compact disc standard, said David Levitan, S-A marketing manager.

"The real issue is the value of the investment in equipment long term. With digital audio tape players coming, it will be possible to do a master-quality reproduction from a compact disc player or DMX tuner," Levitan said.

> **The real issue is the value of the investment in equipment long term. With digital audio tape players coming, it will be possible to do a master-quality reproduction from a compact disc player or DMX tuner.**
>
> David Levitan
> Marketing Manager,
> S-A

And while it remains a bit early to draw firm conclusions, S-A engineers are already thinking about the possibility that DMX receiver circuits could be built right into commercial compact disc players.

For different reasons, Digital Planet, a rival of DMX's, also has looked to the consumer electronics industry in getting its tuners built. In a two-year, $35 million deal that Digital Planet president William DeLany said "shaved at least $8 million off our business plan," Hitachi Ltd., the world's ninth-largest manufacturer, has agreed to build about 15,000 boxes a month for Digital Planet.

As part of the deal, Mitsui Comtek, the trading arm of the Mitsui Group, is providing the financing to Hitachi and is also supervising distribution of the tuners in the U.S. market, said DeLany.

Current plans call for the tuners to be sold directly to cable TV companies as well as through consumer electronics outlets, he said.

Digital Planet's service has just been rolled out to a limited number of customers served by Continental Cablevision's Westchester, Calif. system. For $6 a month, customers get an initial 26 channels of audio.

The service will be rolled out soon to customers at another two systems in Southern California, DeLany said.■

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Attachment 6

DIGITAL MUSIC EXPRESS CUSTOMERS TO HAVE PROGRAM ID REMOTE

ANAHEIM--Scientific-Atlanta has developed a remote for use with the Digital Music Express 30-channel digital audio service which will provide programming information to subscribers through a liquid crystal display on the remote. The service had considered setting up an 800 number, so when the service begins rolling out in early '91, subscribers could call to find out what song they are listening to, the artist and the label. S-A officials said the remotes, which will also control S-A manufactured cable set-tops, will be available for DMX affiliates next summer. DMX officials said operators will have the option of selling or renting the remotes to interested customers. Otherwise, customers will receive a remote with a 10-digit read-out and a catalog of CD selections so they can look up the titles of cuts in which they are interested.

DEADLINE APPROACHES FOR TURNER AFFILIATE PROMOTION FALL ENTRIES

ATLANTA--Documentation of promotion efforts in the fall quarter by affiliates of TBS networks are due Dec. 17. Points earned in the Turner Frequent Promoter Program count toward Turner merchandise and quarterly grand prizes. The winner of the fall contest will fly to Miami, Fla., for NBA's All-Star Weekend Feb. 8-10.

ANTIETAM CABLE TV TO RE-LAUNCH HTS

WASHINGTON--Home Team Sports said it has reached an affiliate agreement with Antietam Cable Television under which the system will carry the sports network as a basic service. The system had previously carried HTS as a pay service. HTS will add 25,000 subscribers to its basic subscriber base of more than 1.9 million.

OLD BASEBALL PLAYERS NEVER DIE; THEY MIGRATE TO CABLE

LOS ANGELES--Prime Network and the Senior Professional Baseball Association have agreed to a 1990-91 cable schedule that will include 12 regular season games and the league's playoffs. The package will include a "game of the week," to be cablecast by Prime affiliates at 1 p.m. (ET) Sundays, plus three Saturday games in December and the February playoffs. The commentators will be broadcast veteran Jay Randolph and former New York Mets manager Davey Johnson. The league consists of six teams in Florida, Arizona and California playing a 56 game schedule. The players are all former Major Leaguers older than 35.

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OF COPYRIGHT
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Comment Letter
RM 90-6
No. 2

Before the
COPYRIGHT OFFICE, LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	
Copyright Office Request	)	RM Docket
for Comments Regarding	)	No. 90-6
Digital Audio Broadcast and	)	
Cable Services	)	

COMMENTS OF THE AFL-CIO DEPARTMENT OF PROFESSIONAL EMPLOYEES, AMERICAN FEDERATION OF MUSICIANS, AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

In response to the Copyright Office's Notice of Inquiry requesting comments on digital audio broadcast and cable services, we submit the following comments on behalf of the AFL-CIO Department of Professional Employees, which comprises 28 national and international unions serving more than two million employed professional people including the American Federation of Musicians, which represents more than 300,000 musicians; and the American Federation of Television and Radio Artists, which serves 90,000 members who perform in the broadcasting and recording industry.

We have a vital and urgent interest in this proceeding because so many of our members are employed in the recording industry. They and their incomes may be adversely affected by the development of digital audio broadcast and cable services unless appropriate steps are taken to protect the copyright interests at

stake here.[1] Specifically, it is essential that the Copyright Office recommend to Congress that it act now to recognize a performance right in sound recordings.[2]

We have long been concerned about the exploitation of sound recordings by broadcasters and others without compensation to those responsible for creating the sound recordings. No other kind of copyrighted work lacks a performance right, which means that the creators of prerecorded music are cheated of an income stream that accrues to all other creators of copyrighted works. Composers and publishers have long received a performance royalty for their creative contributions to a sound recording, while those involved in bringing the music to life in sound recordings are left high and dry.

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[1] In addition, developments that adversely affect record sales can even affect musicians who are not directly employed in the recording industry. For example, diminished record sales mean diminished payments by recording companies to the Music Performance Trust Fund ("MPTF"), which is financed by recording companies on the basis of a formula linked to record sales. The MPTF underwrites live performances by musicians at, inter alia, hospitals, parks, schools and concert halls across the country and thereby boosts employment for our members.

[2] We also urge the Copyright Office to recommend additional legislative steps, described below, to ensure that digital audio services licensed under a performance right do not unnecessarily exacerbate the home taping risks associated with all broadcast and cable transmissions.

A song is nothing but words and music on a printed page until our members, performers and musicians, bring it to life. And when we refer to our members, we mean more than the handful of successful pop and rock artists that most people think of when they think of the music industry; we mean the unseen thousands of professionals who sing the backup vocals, the studio musicians, the technicians and others who produce a sound recording. Together, our members give each song a personality, a meaning, a unique expression that is the product of years of training and dedication to the musical arts. Surely this contribution should be accorded the same copyright benefits that accrue to creators of the underlying musical composition, and all other copyrighted works, thereby enabling our members to share in those rewards.

The absence of a performance right also has international implications. U.S. musicians, performers and recording companies are excluded from the royalty pools of many other nations that currently do recognize a performance right in sound recordings but that limit their distribution to nationals of countries which similarly recognize the right.

All of these inequities are highlighted in the digital audio broadcast/cable environment. Without a performance right, these services will be free to

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exploit our prerecorded music -- even to charge the public to listen to it -- without they themselves paying for it. In short, bedrock principles of equity require an end to the "legalized theft" that the current law permits and demand rectification of this longstanding, unjustifiable gap in U.S. copyright law -- as the Copyright Office itself recognized in 1978. Register of Copyrights, "Addendum to the Report on Performance Rights in Sound Recordings," Performance Right in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary, 95th Cong. 2d Sess. 114 (1978).

We also support the other proposals advanced by the Recording Industry Association of America to complement a performance right in sound recordings and to ensure adequate copyright protection in the digital audio broadcast/cable environment: (1) limitations on the transmission of multiple tracks from the same album and stitched-together "greatest hits" programs and (2) mandatory accurate transmission of digital subcodes contained in prerecorded digital music.

The first proposal is, in our view, a sensible way of supporting the performance right in a manner that will prevent its abuse by curtailing the most blatant inducements to home taping. The second is a way of ensuring that broadcast systems, digital receivers and

cable boxes that are now being designed will be built to enable consumers to receive the valuable information contained in the digital subcodes. It will also facilitate the protection of existing and evolving copyright interests, including any royalty plan or compensation system that, we hope, Congress will eventually enact. These latter items are for future consideration, but inaction now may mean that Congress is foreclosed from acting as it may wish later. Should Congress choose, for example, to pursue the Register's ideas concerning technological compensation systems for home taping, this route would be foreclosed, absent the availability of accurate subcode information.

* * *

For all the foregoing reasons, we urge the Copyright Office to restate its support for a performance right in sound recordings and to recommend to Congress the transmission restrictions described above to ensure adequate protection for copyright in sound recordings in the digital audio broadcast/cable environment.

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Respectfully submitted,

Jack Golodner
President
Department of Professional
Employees, AFL-CIO

December 14, 1990

CERTIFICATE OF SERVICE

I, Kathleen M.H. Wallman, do hereby certify that a true and correct copy of the foregoing "Comments of the AFL-CIO Department of Professional Employees, American Federation of Musicians, and American Federation of Television and Radio Artists" was delivered by hand, on this 14th day of December 1990, to the following:

The Honorable Ralph Oman
Register of Copyrights
Copyright Office
James Madison Memorial Building
First & Independence Ave., S.E.
Washington, D.C.

Kathleen M.H. Wallman

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OF COPYRIGHTS

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Comment Letter
RM 90-6
No. 3

Before the
LIBRARY OF CONGRESS -- COPYRIGHT OFFICE
Washington, D.C.

In re	)	Docket No. RM 90-6
	)	
DIGITAL AUDIO BROADCAST AND CABLE SERVICES	)	

COMMENTS OF STROTHER COMMUNICATIONS, INC.

By Notice of Inquiry released October 24, 1990 (55 Fed. Reg. 42916), the Copyright Office instituted an examination of the development of new digital audio broadcast and cable services and the effects implementation of such services may have on performers and copyright owners of copyrightable works under the Copyright Act of 1976. Interested parties were invited to submit comments pertinent to this inquiry by no later than December 15, 1990. Pursuant to that invitation, Strother Communications, Inc. ("SCI"), by its counsel, hereby submits the following:

1. SCI is the leading proponent of terrestrial, over-the-air digital audio broadcasting ("DAB") in the United States. SCI has applied to the Federal Communications Commission ("FCC") for experimental authority to test DAB in Washington, D.C. and Boston, Massachusetts. SCI has also filed a petition for rule making requesting that the FCC institute a proceeding to allocate spectrum and establish rules and policies governing the use of DAB. SCI is a participant in pending FCC proceedings concerning DAB, both in its individual capacity or as one of the founding members of Ad Hoc Subgroup B of Informal Working Group 2 of the FCC's Industry Advisory Committee. In addition, SCI publishes a newsletter -- DAB Update -- which is devoted exclusively to news and information about DAB. SCI's president and founder, Ronald Strother, a nationally-recognized expert on DAB, has addressed broadcast industry groups and has been featured in articles by trade publications about DAB.

2. SCI has proposed that the FCC adopt rules and policies that would lead ultimately to the replacement of existing AM and FM broadcast systems with DAB. Under SCI's plan, all AM and FM stations would be converted to DAB, resulting in the eventual abandonment of the AM and FM radio bands and the reallocation of those bands for different uses. In other words, SCI has proposed to substitute digital technology for the analog technology now in use by the United States radio broadcasting industry. A copy of SCI's Petition for Rule Making to the FCC, which describes SCI's plan in detail, is attached hereto as Exhibit A.

3. One of SCI's primary concerns is that the implementation of DAB disrupt the broadcasting industry as little as possible. Indeed, it is SCI's position that DAB stations will operate in a way that is almost identical to the way that AM and FM stations are presently operated. That is, DAB stations will broadcast programming over-the-air for the use of the public. Naturally, performers and copyright owners will have to receive fair compensation for any of their works that are transmitted by DAB stations. SCI believes, however, that the existing mechanisms by which such compensation is determined and paid by radio stations will continue to be adequate for that purpose. Thus, in the case of recorded music programs, performers and copyright owners' compensation can be handled under the auspices of ASCAP and other performing rights organizations, exactly as it is today.

4. SCI recognizes the concerns of performers and copyright owners about the copying of works transmitted over-the-air by DAB stations. Nevertheless, SCI does not believe that the extent and nature of such copying will be materially different from that which currently occurs with respect to works transmitted over-the-air by AM and FM stations. In any event, if such off-air copying is perceived to be a problem, forcing DAB stations to transmit scrambled signals is clearly not a solution. Because SCI's plan envisions DAB's use as the exclusive means of over-the-air radio broadcasting, every

radio would have to be equipped with a descrambler to be functional, thereby effectively defeating the purpose of scrambling in the first place and serving only to make radio receiving devices more expensive for consumers.

5. Another major concern for SCI is that DAB be introduced promptly. The United States is already far behind other countries in the development and implementation of DAB technology. If this gap is to be closed, the United States cannot afford delay. SCI urges the Copyright Office to be mindful of this fact, and not recommend any action that would retard DAB's development and use as our nation's next generation of radio broadcast technology.

Respectfully submitted,

Daniel F. Van Horn

Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6030

Counsel for Strother Communications, Inc.

December 14, 1990

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Federal Communications Commission
Office of the Secretary

In the Matter of the Petition of	)	
	)	
STROTHER COMMUNICATIONS, INC.	)	
	)	RM-_____
For Amendment of Parts 2, 73,	)	
and 74 of the Commission's Rules	)	
To Establish a Digital Audio	)	
Broadcasting Service	)	

To: The Commission

PETITION FOR RULEMAKING

Daniel F. Van Horn

Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6030

Counsel for Strother Communications, Inc.

July 26, 1990

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SUMMARY

This petition requests the Commission to institute a rulemaking proceeding to consider the adoption of rules for the introduction and use of a terrestrial digital audio broadcasting ("DAB") system in the United States.

DAB is a digital broadcast technology that has many significant advantages over the analog AM/FM broadcast systems currently in use. DAB has already been tested in both Europe and Canada, and will be one of the topics discussed at the 1992 World Administrative Radio Conference. Unless the Commission acts promptly to consider the use of DAB, the United States will fall far behind other countries in the development and introduction of DAB.

DAB makes it possible to transmit audio signals over the air with sound quality equivalent to a compact disc, something that is not possible with analog AM/FM technology. Because of its inherently superior sound quality, DAB's introduction will make current radio broadcasting systems obsolete. Accordingly, a plan must be developed that will permit the use of this advanced technology without causing undue disruption to the broadcasting industry or the public. Such a plan is presented in this petition. Under this plan, all existing AM and FM stations will ultimately be converted to DAB channels, but this process will occur gradually. Once the conversion is complete, the interference and reception problems associated with AM/FM technology will disappear, all radio stations will compete on a level playing field, and radio listeners will enjoy compact disc quality sound in over-the-air broadcasts. Further, the entire existing AM and FM bands would then be available for other uses.

The petition also identifies alternative places in the radio spectrum where the DAB band could be located.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of the Petition of	)	
	)	
STROTHER COMMUNICATIONS, INC.	)	
	)	RM-_____
For Amendment of Parts 2, 73,	)	
and 74 of the Commission's Rules	)	
To Establish a Digital Audio	)	
Broadcasting Service	)	

To: The Commission

PETITION FOR RULEMAKING

Strother Communications, Inc. ("SCI") hereby petitions the Commission to institute a rulemaking proceeding to allocate spectrum and establish technical and regulatory policies for digital audio broadcasting ("DAB") in the United States.[1/] The grounds for this petition are as follows:

1. DAB is a Major Technological Advance for Radio Broadcasting

The AM and FM transmission systems currently used by radio broadcasters employ mature and well-developed analog technology. That technology was once able to deliver sound quality on a par with all but the finest home music systems. Recently, however, the recorded music industry has made a significant technological advance with the introduction of digital recordings. In fact, many radio broadcasters have embraced digital technology in their studios through the use of compact disc ("CD") players, digital audio tape ("DAT") machines, and hard-disk audio storage devices.

1/ SCI is an applicant for an experimental DAB system to operate in Washington, D.C. and Boston, Massachusetts. SCI's experimental application was filed on May 23, 1990, and is currently pending before the Commission.

The purpose of the change to digital technology is to produce improved sound quality. There is, however, no currently authorized way to deliver this improved sound quality over the airwaves. AM and FM broadcasts are subject to interference of many different sorts from both natural and man-made sources. As a consequence of this interference, many AM stations suffer from greatly reduced coverage at night, and FM signals are often distorted in urban locations or when received in moving vehicles.

DAB is a digital-based technology that can eliminate the interference problems to which AM and FM broadcasts are subject. Furthermore, DAB enables radio signals to be transmitted and received over-the-air with CD/DAT sound quality. DAB uses very short radio waves similar to a conventional FM signal, but capable of much better quality. In DAB, the radio wave carries a stream of pulses of the type that are used for the operation of computers. Thus, DAB represents the entry of computer technology fully into the realm of radio broadcasting.[2/]

DAB makes possible the use of "smart" receivers that can correct the fading and interference problems associated with AM and FM broadcasts. Special signal coding at the transmitter can tell the receiver how to compensate for information that is lost between the transmitter and the receiver. DAB also enables the receiver to use reflected signals as alternate information sources when the main signal deteriorates. Thus, DAB is not subject to multipath interference and will deliver extraordinarily high audio quality even in hostile receiving environments.

DAB is also a very efficient technology. The DAB system that has been developed in Europe can transmit up to 16 separate stereo channels in 4 MHz of

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2/ A detailed description of DAB technology is contained in SCI's application for authorization to operate an experimental DAB system. Those materials are incorporated herein by reference. The technological aspects of this petition are supported by the affidavit of Steven J. Crowley, which is attached hereto as Exhibit 1.

spectrum. Accordingly, in all but the very largest radio markets, one or two DAB 4 MHz channel groups could fulfill the transmission requirements of all the AM and FM stations in the market. This efficiency is achieved in part by using special coding techniques to reduce the number of data "bits" that normally would have to be transmitted for each stereo signal, thereby reducing the amount of spectrum each signal requires.

In addition to greater spectrum efficiency, DAB permits a much higher degree of allocations flexibility than AM or FM. In those services, the assignment of a broadcast channel to a particular community effectively precludes adjacent channel reuse in a large surrounding area that extends beyond the service contour of the assigned channel. The modulation scheme for DAB, on the other hand, eliminates such adjacent channel restrictions, and enables the service areas of adjacent DAB channels to abut one another. Furthermore, unlike AM and FM, DAB as proposed by SCI allows the use of small, on-frequency boosters to fill coverage gaps without creating interference in areas between the booster and main facility.

Finally, even though this petition is directed toward the terrestrial applications of DAB, this technology could also be used for a complementary satellite-based service for coverage of areas with low population density or for international broadcasts (e.g., as a replacement for present day shortwave stations).

2. The Conversion to DAB is Already Underway in Other Nations

As shown by the preceding section, DAB is not merely an evolutionary step in broadcasting technology. To the contrary, DAB is a fundamentally different kind of technology which is clearly superior to current methods of audio signal delivery. The United States, however, is lagging far behind other nations in the development and introduction of this new and improved broadcasting system.

DAB has been under development in Europe for five years. The European DAB project is being carried out under the auspices of EUREKA, a consortium of European nations that funds a variety of research efforts, and the European Broadcasting Union. The Europeans have spent millions of dollars on DAB, and experimental DAB testing has been completed in England, France, Germany, and Switzerland.

Canada is also taking steps toward the introduction of DAB. A DAB demonstration called "Digital Radio - The Sound of the Future" is currently underway in Canada. That demonstration is being sponsored by a joint venture composed of the Canadian Association of Broadcasters, the Canadian Broadcasting Corporation, and Communications Canada. It will include not only "listening comparisons" between DAB and FM, but also extensive laboratory and field testing of the European DAB system.

The actions of the European and Canadian governments show that DAB is not a theoretician's dream. The technology to implement a comprehensive DAB system already exists, and the introduction of such a system outside the United States seems bound to occur in the relatively near future. If the Commission fails to go forward now to make plans for the use of DAB, the United States will fall farther behind technologically when compared to those countries that are taking positive steps to prepare for the use of DAB as a commercial audio medium. Moreover, the World Administrative Radio Conference ("WARC") in 1992 will consider both spectrum allocation for DAB and the world standard for digital radio transmitting and receiving equipment. If the United States delegation is to participate in those negotiations in a meaningful way, the Commission must soon decide how DAB will be incorporated into the domestic radio industry.

Unless the Commission acts promptly to consider the technical and policy issues raised by DAB, the United States will abdicate the leading role in the develop-

ment of that technology to other countries. Such a result would not only disadvantage United States radio listeners, broadcasters, and equipment manufacturers, it would also erode the United States' position as a world leader in the field of emerging technologies. Therefore, the institution of a rulemaking proceeding to consider the adoption of rules concerning DAB is both appropriate and timely.

2. DAB Can Be Introduced With Minimum Disruption to the Radio Industry and the Public

Because of its clear superiority to existing broadcast technology, the introduction of DAB as a parallel service in competition with AM and FM broadcasting would immediately obsolete the latter services and have a severe economic impact on established broadcasters. Therefore, SCI has developed a plan for the introduction of digicasting that is designed to protect the interests of the United States broadcasting industry. SCI's digicasting plan consists of the following elements:

1. The entire United States would be partitioned into non-overlapping DAB market areas. One or more DAB channel groups, each consisting of 4 MHz of radio spectrum,[3/] would be assigned to each market. Each channel group would be made up of 16 individual DAB channels. Enough channel groups would be allocated to each market to provide an individual DAB channel for every commercial and noncommercial AM and FM station licensed to the communities located within the defined DAB market area.

3/ SCI's proposed DAB channel group configuration is based on the DAB system developed in Europe, which is the most advanced DAB system currently available. To the extent that a different international standard for DAB is ultimately agreed upon at the 1992 WARC, or the Commission concludes that a different DAB system should be used in the United States, SCI's plan could be modified as appropriate to reflect those developments without altering the plan's underlying framework.

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2. The licensee of each AM and FM station would be licensed to use one DAB channel in the DAB market area where the station's community of license is located. Thus, licensees of AM/FM combinations located in the same DAB market area would receive two DAB channels in that market area.[4/]

3. The transmission facilities for each DAB channel group would be licensed jointly to the licensees whose individual channels make up each channel group. Those licensees would be required to form a consortium or cooperative venture for the construction, operation and maintenance of their common transmission plant. Because of the advanced technical features of DAB that permit extensive adjacent channel reuse and precise tailoring of service areas, it is possible, and each consortium would be authorized, to construct facilities to serve the entire DAB market area to which the channel group is assigned, but not to extend their signals beyond the market area's boundaries.

4. Even though the signals comprising each channel group will originate from common transmission facilities and will have full market coverage, the individual DAB channels will remain licensed to specific communities in the market area, and each channel licensee will be responsible for its own programming and for providing local service for its designated community. In other words, an AM station licensed to Cedar Rapids, Iowa will simply be converted into a DAB station licensed to serve Cedar Rapids. The only difference is that the licensee of the DAB channel will transmit its

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4/ The multiple ownership rules could be extended to DAB with little change. A maximum of 24 individual DAB stations could be owned, operated, or controlled by a single entity (28 for minority-owned companies), no more than 2 of which could be located in the same DAB market area. In cases where more than 2 stations controlled by the same entity are located in a DAB market area (due to the absence of overlapping AM or FM contours), ownership of additional DAB stations would be "grandfathered" so long as they remained under the control of the original licensee. Cf. First Report and Order in Docket No. 18110, 22 F.C.C.2d 306, 309 (1970).

programming from a common transmission plant and will be able to provide a CD/DAT quality signal to the entire Cedar Rapids DAB market area.

5. DAB channels that are not required to accommodate existing broadcast stations would be made available for application using a "window filing" and "first come/first serve" system analogous to the one currently used for FM channels. DAB channels could be awarded to applicants either through lottery or comparative hearing.5/ Applicants would be required to specify a particular community in the DAB market area which their requested channel would be licensed to serve. Successful applicants would be required to become part of the consortium for their respective channel groups. Additional channel groups would be assigned to markets as demand and technical considerations warrant.

6. Transition rules would permit AM/FM broadcasting and DAB to operate side-by-side with simulcast operations until digital receiver penetration reached a designated level in a market area, after which the AM/FM operations would be phased out. For example, the Commission could require digital receiver penetration of 65% before the beginning of the phase out period. After that penetration level was reached in a market area, the AM and FM stations in the market area could continue simulcasting on their DAB channels for up to 2 years. At the end of the 2-year phase out period, AM and FM operations in the market area would cease, and all stations in the market area would operate exclusively with DAB channels.

5/ The Commission has recently proposed the use of a "pioneer's preference" in connection with the granting of licenses for new and innovative services. SCI submits that it should receive such a preference, if its use is approved, for any applications that SCI files for the DAB channels that are not reserved for use by existing station licensees. A separate petition requesting such a preference is being filed simultaneously herewith.

SCI's plan is based on prior Commission actions dealing with the introduction of new or improved services. The partitioning of the country into separate and distinct markets is derived from the rules that established the cellular telephone service.[6/] The use of a mandatory consortium for the transmission of each channel group is analogous to prior cases where the Commission has required cooperative ventures composed of a single licensee or service provider.[7/] The procedures for licensing the new channels that DAB will make available (i.e., those not required to accommodate established stations) follow those used to award the FM channels created as a result of MM Docket No. 84-231.[8/] Thus, every aspect of SCI's plan is consistent with Commission precedent.

SCI's plan would benefit broadcasters and the public without resulting in any undue disruption of the radio industry. New digital studio equipment would be phased in as the equipment industry can supply it and as broadcasters can afford it. Equipment will be replaced in the normal depreciation/replacement cycle, and no current equipment will be instantly obsolete. In fact, station owners would immediately benefit from the noise and interference reduction that the conversion to DAB would bring about even with existing, non-digital studio equipment. To the extent that broadcasters do purchase new equipment, those expenses will be more than offset in the long run by

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6/ Memorandum Opinion and Order or Reconsideration in CC Docket No. 79-318, 89 F.C.C.2d 58, 86-87 (1982).

7/ See Memorandum Opinion and Order in Gen. Docket No. 84-1234, 4 FCC Rcd. 6023, 6032 (1989); Tentative Decision in CC Docket No. 80-584, 92 F.C.C.2d 736, 747-49 (1982) (citing cases).

8/ Report and Order in MM Docket No. 84-750, ___ F.C.C.2d ___, 58 R.R.2d 776 (1985); see also, Report and Order in MM Docket No. 83-135, 102 F.C.C.2d 295, 297-300 (1984) (adoption of filing windows for Low Power Television and Television Translator Service).

savings resulting from the use of common transmission facilities.[9/] Operating costs will be even lower owing to the fact that DAB technology needs considerably less powerful transmitters than does AM/FM technology, and generally requires lower antenna height than current FM operations designed to provide comparable "wide area" coverage. These features of DAB will produce environmental and safety benefits by reducing the need for tall towers, lowering radiofrequency radiation levels, and eliminating many electromagnetic interference problems that might otherwise cause a hazard to air navigation or disruption to communications services. Moreover, once the conversion to DAB is completed, the entire AM and FM bands will be vacated and available for reallotment for other uses.

Apart from the use of common transmission facilities, the licensees of the individual DAB channels would be indistinguishable from present day licensees of AM and FM stations. Each DAB channel would be separately programmed by the channel licensee, who would be obligated to present programming responsive to issues of public concern facing the community the channel is licensed to serve. The licenses for individual DAB channels would have to be renewed at 7-year intervals and could be assigned, transferred, or revoked in accordance with existing rules, policies, and procedures. The only difference would be that any new licensee would have to become a member of the consortium or cooperative venture that operates the common transmitter for the relevant channel group.

The current distinction between AM and FM would vanish after the transition to DAB was completed. All radio stations would operate on a single band, would have

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9/ It should be noted that some broadcast licensees are already using arrangements similar to the jointly licensed transmission facilities proposed by SCI. For example, certain FM station owners have voluntarily formed partnerships to construct tall towers or to utilize common or "candelabra" antenna systems.

identical sound quality, and would be guaranteed coverage of their DAB market areas. In other words, radio stations would be on a level playing field, and competition among them would be based on programming rather than engineering considerations. Channel upgrades, "move-ins," and technical schemes to achieve "parity" between different broadcast modes will become unnecessary, thereby dramatically reducing the technical aspects of radio regulation and easing the Commission's workload.

DAB will allow broadcasters to pass on to their listeners the quality benefits of the latest digital studio technology. The public will no longer have to rely only on home audio equipment for near-perfect sound reproduction. Instead, CD/DAT - quality, interference-free reception of all radio stations in a market will be possible both at home and on the highway. New receivers will, of course, be required to take advantage of DAB's improved sound quality. Under SCI's plan, however, existing AM and FM radios will not become instantly obsolete because broadcasters will simulcast their programming on the DAB and the AM/FM bands until a majority of listeners have purchased new digital radios voluntarily. Given the public's rapid acceptance and desire for CD and DAT players, VCR's, and other technologically advanced electronic products, SCI does not anticipate that this aspect of its plan will result in any significant delay in the conversion to DAB. Furthermore, while DAB receivers will contain more integrated circuits and other devices, and will therefore be more complex than AM/FM radios, SCI believes that, once mass production of DAB receivers begins, their cost will quickly become comparable to the price of AM/FM radios today.

In short, the United States can convert radio broadcasting from AM/FM to DAB in an orderly way that is totally consistent with the concepts of private station ownership, local service, and licensee accountability on which our system of broadcast regulation is based. For both the broadcaster and the public, DAB can be just like AM and FM, only better.

4. **There Are Several Places In the Spectrum Where the DAB Band Could Be Located**

SCI requests that 48 MHz of bandwidth be made available for terrestrial DAB. In the most spectrum-efficient configuration for DAB, each DAB channel requires 250 kHz of spectrum. Therefore, 192 individual channels would exist. These channels would be assembled into 12 adjacent channel groups, each containing 16 channels.

It is requested that the 48 MHz come from the frequency range 225-2700 MHz, with the preferred allocation being as close to 225 MHz as possible. The lower frequencies offer superior terrestrial propagation characteristics and economies of system implementation.

The bands listed below have been identified by SCI as having potential to accommodate a DAB system. Each band's primary domestic allotment is given along with a brief description of present activity in the band. The list is not necessarily exhaustive.[10/]

1. 225 - 399.9 MHz. 225 - 328.6 MHz and 335.4 - 399.9 MHz are allocated for fixed and mobile use by the government. 328.6 - 335.4 MHz is allocated for aeronautical radio navigation.

2. 470 - 608 MHz. This band is used for UHF television channels 14 - 69. Channel 37 (608 - 614 MHz) is reserved for radio astronomy use. SCI is aware of the concern that sufficient channels be made available for simulcasting high-definition television. It appears that recent developments in the field of video compression, however,

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10/ Some of the identified bands are allocated for government use. It is requested that the Commission ask the National Telecommunications and Information Administration ("NTIA") to release portions of these bands for a DAB service. Such a request is timely in light of growing congressional sentiment for nongovernment use of some present government frequencies. See e.g., H.R. 2965, Emerging Technologies Act of 1989, 101st Cong., 1st Sess. (1989).

may greatly lower spectrum requirements for HDTV. Furthermore, after conversion to DAB, the present FM band could be reallocated for television broadcasting.

3. 1460 - 1530 MHz. This band is allocated for mobile use (aeronautical telemetry) for both government and non-government use. It is used for flight test operations.

4. 1710 - 1850 MHz. This band is allocated for fixed and mobile use by the government. According to NTIA, this band is the predominant medium-capacity line-of-sight communications band. It has over 4,000 assignments, and growth has been averaging more than 400 per year since 1982. The U.S. Department of Agriculture, Department of Defense, and Department of Energy have the most assignments. Fixed stations make up the largest class of use (87%), while mobile, space and experimental stations make up the rest.[11/]

5. 1850 - 1990 MHz. This band is allocated to the Private Operational Fixed Microwave Service operating under Part 94 of the FCC's rules.

6. 2200 - 2290 MHz. The U.S. allocates the band to the government for fixed, mobile, and space research (space-to-earth and space-to-space). This band has over 1700 assignments, and the growth since 1983 has been approximately 80 per year. The Department of Defense, Department of Energy, and the National Aeronautics and Space Administration are the primary users. Telemetry represents about 55% of the total assignments. The remainder is equally split between fixed, space, and experimental

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11/ See Spectrum Resource Assessment of the Federal Government Fixed Service (Bands Above 400 MHz), NTIA Report SO-87-127, U.S. Department of Commerce, National Telecommunications and Information Administration, Washington, D.C., September 1987.

This is not a comprehensive report of usage. NTIA is readying an updated report concerning spectrum usage in the 225 - 5000 MHz band, but the report will not be available until August, 1990.

stations.[12/]

7. 2500 - 2690 MHz. In the U.S. allocations table, 2500 - 2690 MHz is allocated for fixed and broadcasting-satellite use. It is used for auxiliary broadcasting service under Part 74 of the FCC's rules. The band 2665 - 2690 is also allocated for private operational-fixed microwave service under Part 94 of the FCC's rules. Users include the Instructional Television Fixed Service (2500 - 2686 MHz) and the Multipoint Distribution Service (2686 - 2644 MHz).

SCI is proposing a terrestrial DAB system. SCI realizes, however, that a comprehensive DAB system may include a satellite component. Ideally, both should function in the same band; however, if this is impractical for international uniformity or lack of spectrum, SCI believes that the band 500 - 2000 MHz would be suitable for satellite operation with the European DAB system. SCI proposes that the satellite band be placed in a band higher in frequency, and separate from, the terrestrial band.

5. Conclusion

A new era in radio broadcasting technology is underway. Current terrestrial AM and FM analog facilities are the systems of the past, are incapable of reproducing the digital quality sound of modern studio equipment, and suffer from inherent technological drawbacks. In contrast to AM/FM, DAB offers greater spectrum efficiency, less interference, and true CD/DAT quality sound. In addition, with DAB, no radio station will have to contend with inherent technological or engineering handicaps. Indeed, transmission costs could actually be reduced, and each station would be able to cover its entire market area with a stereo signal of superb quality.

Because of its demonstrated superiority to AM and FM, it is inevitable that DAB will ultimately replace the latter two services. DAB will constitute a revolution in

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12/ Ibid.

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radio broadcasting even more profound than was brought about by the introduction of FM stereo several decades ago. This revolution is already in progress, and the longer that the Commission ignores DAB, the wider the technological gap will become between the United States and those countries that are preparing for the eventual conversion to a digital broadcasting system. The case for DAB is compelling, and time to begin laying the foundation for its use in the United States is at hand.

Therefore, in view of the foregoing, SCI requests that the Commission institute a rule making proceeding to consider SCI's plan to institute DAB in the United States.

Respectfully submitted,

Daniel F. Van Horn

Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6030

Counsel for Strother Communications, Inc.

July 26, 1990

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STATEMENT OF STEVEN J. CROWLEY

Steven J. Crowley hereby states as follows:

1. I am a registered professional engineer in the District of Columbia, and a Senior Engineer with the firm of du Treil, Lundin & Rackley, Inc., with offices in Washington, D.C. My qualifications are a matter of record with the Federal Communications Commission.

2. I have assisted in the preparation of the foregoing petition of Strother Communications, Inc. for rulemaking to establish rules for the introduction of digital audio broadcasting ("DAB") in the United States. To the best of my knowledge, the technological and engineering aspects of the petition, including the description of DAB's potential benefits and the listing of possible spectrum allotments for DAB, are accurate.

I state under penalty of perjury that the foregoing is true and correct. Dated this 26th day of July, 1990.

Steven J. Crowley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of the Petition of	)	
	)	
STROTHER COMMUNICATIONS, INC.	)	
	)	RM-_____
For Amendment of Parts 2, 73,	)	
and 74 of the Commission's Rules	)	
To Establish a Digital Audio	)	
Broadcasting Service	)	

RECEIVED
AUG 1 1990
Federal Communications Commission
Office of the Secretary

To: The Commission

ERRATA TO PETITION FOR RULEMAKING

On July 26, 1990, Strother Communications, Inc. ("SCI") filed a Petition for Rulemaking to allocate spectrum and establish technical and regulatory policies for digital audio broadcasting in the United States. After that filing was made, two errors were discovered in the Petition. Those errors are as follows:

1. On page 4, line 5, the word "completed" should be "conducted".
2. On page 11, the second numbered paragraph should be captioned "407 - 806 MHz" instead of "407 - 608 MHz".

SCI hereby requests that its Petition be corrected as set forth above.

Respectfully submitted,

Daniel F. Van Horn

Daniel F. Van Horn

Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6030

Counsel for Strother Communications, Inc.

August 1, 1990

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of	)	
	)	
STROTHER COMMUNICATIONS, INC.	)	
	)	
Amendment of Parts 2, 73,	)	RM-_____
and 74 of the Commission's Rules	)	
To Establish a Digital Audio	)	
Broadcasting Service	)	

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SEP - 5 1990
Federal Communications Commission
Office of the Secretary

TO: The Commission

SUPPLEMENT TO PETITION FOR RULE MAKING

On July 26, 1990, Strother Communications, Inc. ("SCI") filed a Petition for Rule Making to allocate spectrum and to establish technical and regulatory policies for digital audio broadcasting ("DAB") in the United States. In that petition, SCI outlined a plan whereby the radio broadcasting industry could be converted to digital technology with minimal adverse consequences for broadcasters and the public. After filing its petition, SCI undertook further research and study which has led to a refinement of SCI's plan. Accordingly, SCI hereby supplements and amends its petition to present the results of that research. SCI hopes that this supplement will serve to clarify its plan and bring into sharper focus those technical and regulatory issues affecting the introduction of a terrestrial DAB system.

SCI's petition recommended that 48 mHz of bandwidth be allocated for terrestrial DAB, and that distinct, non-overlapping DAB markets be created to which one or more specific DAB channel groups would be assigned for broadcast use. As part of SCI's continuing DAB research, SCI has recently tested the spectrum requirements for terrestrial DAB by examining existing radio markets, configuring them into DAB service areas, and then determining the amount of spectrum required to enable each existing and proposed commercial and non-commercial radio station to have a DAB channel, and

to permit expansion of public radio and the institution of a reasonable number of new commercial radio services in the future.

As the starting point for its study, SCI used the Consolidated Metropolitan Statistical Areas ("CMSAs") and the Metropolitan Statistical Areas ("MSAs") as defined by the United States government. Both CMSAs and MSAs are recognized by government and industry to share geographic, economic, and social commonalities, and are generally considered as radio "markets". Moreover, the use of those geographic areas, as well as rural areas outside of CMSAs and MSAs, as DAB service areas is consistent with the Commission's use of such areas for purposes of licensing cellular radio facilities.

SCI then examined how DAB 4 MHz channel groups could serve certain CMSAs and MSAs most effectively and efficiently. CMSAs understandably present the greatest challenge for the conversion to DAB because CMSAs are broad geographic areas characterized by several centers of high population density and a high concentration of existing radio services.

SCI gave especial attention to the New York CMSA. SCI's studies and analysis demonstrated that an attempt to assign a DAB channel to every existing radio station in the New York CMSA so that each station could serve the entire CMSA would place extreme demands on DAB technology and result in inefficient spectrum use, even after allowing for the reuse of adjacent channel groups permitted by DAB. More importantly, such an approach would not conform to marketplace reality and, if implemented, could drastically alter the nature of the market both in terms of the number of stations and their coverage. Because SCI believes that the transition to DAB should be carried out with a minimum of disruption to the broadcasting industry, SCI views such a result as fundamentally undesirable on policy grounds.

Both the government and radio industry consider a CMSA as both an overall market and as containing distinct, highly-populated secondary markets that are part of

that larger overall market. For example, while Santa Ana-Anaheim is recognized as a distinct radio market in its own right, it is also considered part of the Los Angeles metropolitan market. SCI has concluded that the preferable way to insure that the introduction of DAB is not unduly complicated by spectrum and allocation considerations that could seriously destablize the broadcasting industry is to follow the currently-recognized practice of treating CMSAs as both overall "primary" markets and constituent "secondary" markets.

SCI therefore proposes that the Commission establish two separate DAB service area classifications for CMSAs. The Primary DAB Service Area would consist of the entire CMSA. Each Secondary DAB Service Area would consist just of those counties that make up a secondary market in the CMSA. For example, a station such as WPLJ-FM, which is licensed to New York City and serves the entire New York metropolitan area, would be assigned to the Primary New York DAB Service Area, and would consequently be authorized to serve the entire New York CMSA. On the other hand, stations that are licensed to communities on Long Island would be assigned DAB channels licensed to cover the Secondary Nassau-Suffolk DAB Service Area. A suggested configuration of the New York CMSA into Primary and Secondary DAB Service Areas, as developed by SCI, is set forth in Appendix A attached hereto. Based on that configuration, SCI has determined that ten 4-MHz channel groups would be sufficient to convert the New York CMSA and the surrounding MSAs and rural service areas to DAB. Moreover, these ten 4-MHz channel groups would permit future expansion of commercial and public DAB service -- after existing broadcasters are provided for -- as demand and market conditions warrant.[1/]

1/ SCI wishes to emphasis that it does not advocate sudden, dramatic expansion of the number of audio signals in radio markets because of the conversion to DAB. Such a result could create a "land rush" mentality that could seriously disrupt the radio
(continued...)

New York is one of the most densely populated CMSAs in the United States and is located in a region where there are a very large number of existing radio stations. Because this concentration of existing services makes New York an especially challenging market to convert to DAB, SCI is confident that 40 MHz represents the minimum amount of spectrum required for a terrestrial DAB system based on the plan outlined in SCI's petition for rule making. SCI tested this conclusion by configuring several other markets for DAB. The results of one of those studies, the Indianapolis MSA, is attached hereto as Appendix B. In each case, the DAB Service Area could simply duplicate the existing MSA.[2/] Stations licensed to communities located in the MSA could therefore be assigned a DAB channel licensed to serve the entire MSA.[3/]

1/(...continued)
industry and overwhelm the Commission's application processing capacity. Rather, SCI recommends that channels be made available for assignment gradually, perhaps upon petition by interested parties, only after all previously available channels in the DAB Service Area have been assigned or applied for. This approach would insure that aspiring station licensees will not be foreclosed from entering the industry, and that channels will be available for future expansion by public radio.

2/ The Primary/Secondary Service Area concept recommended by SCI for the CMSAs could be extended to the smaller MSAs if the Commission concluded that such action is appropriate. SCI, however, does not endorse such action. Breaking down the MSAs will not result in the most efficient use of DAB technology, and would encourage artificial gerrymandering of recognized metropolitan areas into separate "markets" that may not really exist. Because distinct secondary markets are an acknowledged fact in CMSAs, their use as distinct DAB service areas does not require the same high degree of subjectivity that is needed to subdivide an MSA in a similar manner. Therefore, SCI recommends that the Primary/ Secondary Service Area concept be limited to those cases where its use is consistent with established radio industry custom.

3/ SCI's plan contemplates that the individual stations assigned to each multiple-channel DAB channel group will be jointly licensed to operate from common transmission facilities. Depending on the frequencies that are ultimately selected for terrestrial DAB use and the exact size and shape of individual DAB service areas, it may not be possible to serve an entire DAB service area from only one transmitter site. Accordingly, SCI proposes that the licensees assigned to each DAB channel group be permitted to operate in a manner analogous to cellular radio licensees, and establish as many transmission "cells" as necessary to provide complete interference free, CD-quality coverage of their respective communities of license and the other portions of their designated DAB
(continued...)

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Therefore, based on the results of its recently-completed studies, SCI amends its petition for rule making to request that 40 MHz of spectrum, rather than the 48 MHz originally proposed by SCI, be allocated for terrestrial DAB. That is, the terrestrial DAB band would consist of ten 4-MHz channel groups, each of which could accommodate up to 12 or 16 separate audio signals, depending on what DAB system is selected as the national standard. SCI also recommends that an additional 16-20 MHz be allocated for international satellite-based digital audio services, such as VOA, that are currently transmitted by shortwave and desperately needed more reliable and better quality signals, and for other international telecommunications applications. Finally, additional spectrum could be allocated for domestic satellite-based audio services that would compliment terrestrial DAB by providing service for underserved or unserved rural areas and innovative national and regional services such as reading services for the blind, slow-scan video, and nationwide EBS and public service programming. SCI's proposed apportionment of the DAB band is set forth in Appendix C attached hereto.

SCI recognizes that finding spectrum for DAB is a major regulatory challenge. In its petition, SCI identified and recommended for Commission consideration the most promising potential frequency allocations for DAB. Nevertheless, that issue needs further study, and probably cannot be finally resolved until the 1992 World Administrative Radio Conference. This fact is not, however, grounds to defer consideration of DAB until after WARC-92 is completed. A variety of issues affecting DAB are wholly independent of the spectrum allocated to DAB. By addressing and resolving those issues now, the United States will be in a better position to take a

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3/(...continued)
Service Area. In other words, while the members of each DAB channel group consortium would operate common transmission facilities, there might well be several such facilities in the DAB Service Area. SCI has proposed to test such on-channel "gap filler" DAB transmitters as part of its proposed experimental DAB stations in Boston and Washington.

leadership role in the planning for DAB at WARC-92, and to begin the transition to digital broadcast technology promptly after the allocation issue is settled.

SCI therefore applauds the Commission's recent decision to adopt a Notice of Inquiry concerning digital audio radio services (Gen. Docket No. 90-357, released August 21, 1990). DAB is rapidly moving beyond the prototype stage and, if the United States is to participate in and take advantage of the benefits of that revolutionary technology, regulatory policies concerning DAB must be developed. SCI hopes that the plan presented in its petition for rule making, as amended and supplemented herein, will help to identify and stimulate discussion about the key issues affecting those policies, and thereby accelerate the adoption of rules and policies to convert the United States radio industry to DAB.

Respectfully submitted,

Daniel F. Van Horn

Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6030

Counsel for Strother Communications, Inc.

September 5, 1990

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APPENDIX A

SCI'S RECOMMENDED MSA MODEL FOR THE CONFIGURATION OF DIGITAL AUDIO BROADCASTING SERVICE AREAS

MARKET -- NEW YORK, NEW YORK

MSA RANKING -- #1

COUNTIES COMPRISING MSA -- Bronx, Queens, Kings, Richmond, Westchester, New York, Putnam, and Rockland

SOURCES --
Duncan's 1989 Market Guide
Duncan's Fall 1989 American Radio
Duncan's Technical Facilities of American Radio (1989 - 1990 Edition)
Rand McNally 1990 Commercial Atlas & Marketing Guide
The Broadcasting Yearbook, 1990
Standard Rates and Data Services, January 1, 1989
National Cellular Map, Comp-Comm, Inc.

PRESENT RADIO BROADCAST FACILITIES APPEARING IN THE NEW YORK CITY MARKET

AM

WABC New York, NY
WADO New York, NY
WCBS New York, NY
WEVD New York, NY
WFAN New York, NY
WINS New York, NY
WJIT New York, NY
WKDM New York, NY
WLIB New York, NY
WMCA New York, NY
WNEW New York, NY
WOR New York, NY
WQXR New York, NY
WSKQ Newark, NJ
WWRV New York, NY
WWRL Woodside, NY
* WNYC New York, NY

FM

WBLS New York, NY
WCBS New York, NY
WHTZ Newark, NJ
WSKQ New York, NY
WLIW New York, NY
WNCN New York, NY
WNSR New York, NY
WNEW New York, NY
WPAT Paterson, NJ
WQCD New York, NY
WQHT New York, NY
WRKS New York, NY
WPLJ New York, NY
WQXR New York, NY
WYNY Lake Success, NY
WXRK New York, NY
* WNYC New York, NY
* WNYU New York, NY
* WHCR New York, NY
* WKCR New York, NY
* WBAI New York, NY
* WFUV New York, NY

* -- Non Commercial

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SUMMARY OF PRESENT STATUS

Total Number of AM Appearing in New York	:	**17**
Commercial	: 16	
Public	: 1	
Total Number of FM Appearing in New York	:	**22**
Commercial	: 16	
Public	: 6	
Total Number of AM/FM Appearing in New York	:	**39**
Commercial	: 32	
Public	: 7	

SCI'S PRIMARY NEW YORK CITY DAB SERVICE AREA

The following stations would be licensed to cover the Primary New York City DAB Service Area:

AM

WABC New York, NY
WADO New York, NY
WCBS New York, NY
WEVD New York, NY
WFAN New York, NY
WINS New York, NY
WJIT New York, NY
WKDM New York, NY
WLIB New York, NY
WMCA New York, NY
WNEW New York, NY
WOR New York, NY
WQXR New York, NY
WSKQ Newark, NJ
WWRV New York, NY
WWRL Woodside, NY
* WNYC New York, NY

FM

WBLS New York, NY
WCBS New York, NY
WHTZ Newark, NJ
WSKQ New York, NY
WLIW New York, NY
WNCN New York, NY
WNSR New York, NY
WNEW New York, NY
WPAT Paterson, NJ
WQCD New York, NY
WQHT New York, NY
WRKS New York, NY
WPLJ New York, NY
WQXR New York, NY
WYNY Lake Success, NY
WXRK New York, NY
* WNYC New York, NY
* WNYU New York, NY
* WHCR New York, NY
* WKCR New York, NY
* WBAI New York, NY
* WFUV New York, NY
* WKRB Brooklyn, NY
* WNYE Brooklyn, NY
* WSIA Staten Island, NY

* -- Non Commercial

AM AND FM COMBINATIONS

AM	FM	LICENSEE
WWPR	WPLJ	Cap Cities/ABC
WCBS	WCBS	CBS, Inc.
WEVD	WQHT	Emmis Brdcstg.
WZRC	WXRK	Sagittarius Brdcstg.
WLIB	WBLS	Inner City Brdcstg.
WNEW	WNEW	Metropolitan
WNYC	WNYC	New York Municipal
WQXR	WQXR	Interstate Brdcstg.
WOR	WRKS	RKO General, Inc.
WPAT	WPAT	Park Radio of NY

SUMMARY OF SCI'S PRIMARY NEW YORK CITY DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 42

Commercial : 32
Public : 10

Total Number of 4Mhz Channel Groups Needed to Accomodate Transition Under SCI Plan:

16 Signals Per 4Mhz : 3
12 Signals Per 4Mhz : 4

SCI'S SECONDARY LONG ISLAND DAB SERVICE AREA

Includes the counties of:

NY: Nassau & Suffolk

The following stations would be licensed to cover the Secondary Long Island DAB Service Area:

AM	FM
WBAB Freeport, NY	WALK Patchogue, NY
WALK Patchogue, NY	WBAB Babylon, NY
WGLI Babylon, NY	WBAZ Southold, NY
WGSM Huntington, NY	WBLI Patchogue, NY
WHLI Hempstead, NY	WCTO Smithtown, NY
WLIM Patchogue, NY	WDRE Garden City, NY
WLIX Islip, NY	WHFM Southampton, NY
WLNG Sag Harbor, NY	WKJY Hempstead, NY
WNYG Babylon, NY	WLNG Sag Harbor, NY
WRHD Riverhead, NY	WRCN Riverhead, NY
WRIV Riverhead, NY	WWHB Hampton Bays, NY
WTHE Mineola, NY	* WFRS Smithtown, NY
	* WBAU Garden City, NY
	* WHPC Garden City, NY
	* WPBX Southampton, NY
	* WRHU Hempstead, NY
	* WCWP Brookville, NY
	* WPOB Plainview, NY
	* WKWZ Syosset, NY

* -- Non Commercial

AM AND FM COMBINATIONS

AM	FM	LICENSEE
WALK	WALK	Life Radio, Inc.
WBAB	WBAB	Noble Brdcstg.
WHLI	WKJY	Long Island Brdcstg.
WLNG	WLNG	Main Street Brdcstg.
WRHZ	WRCN	East Shore Acquisition

SUMMARY OF SCI'S SECONDARY LONG ISLAND DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 31

Commercial	:	**23**
Public	:	**8**

Total Number of 4Mhz Channel Groups Needed to Accomodate Transition Under SCI Plan:

16 Signals Per 4Mhz	:	**2**
12 Signals Per 4Mhz	:	**3**

SCI'S SECONDARY NEWARK DAB SERVICE AREA

Includes the counties of:

NJ: Essex, Morris, Sussex, and Union

The following stations would be licensed to cover the Secondary Newark DAB Service Area:

AM	FM
WMTR Morristown, NJ	WSUS Franklin, NJ
WNNJ Newton, NJ	WNNJ Newton, NJ
WXMC Parsippany, NJ	WPME Newark, NJ
WERA Plainfield, NJ	WNWK Newark, NJ
WKMB Stirling, NJ	* WBGO Newark, NJ
WJDM Elizabeth, NJ	* WSOU S. Orange, NJ
WMTR Newark, NJ	* WPMU E. Orange, NJ
	* WMSC Upr. Montclair, NJ
	* WNNJ Madison, NJ
	* WJSV Morristown, NJ

* -- Non Commercial

AM AND FM COMBINATIONS

AM	FM	LICENSEE
WNNJ	WNNJ	Group N Comm.

SUMMARY OF SCI'S SECONDARY NEWARK DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 17

Commercial : 11
Public : 6

Total Number of 4Mhz Channel Groups Needed to Accomodate Transition Under SCI Plan:

16 Signals Per 4Mhz : 2
12 Signals Per 4Mhz : 2

SCI'S SECONDARY MONMOUTH - OCEAN DAB SERVICE AREA

Includes the counties of:

NJ: Monmouth and Ocean

The following stations would be licensed to cover the Secondary Monmouth - Ocean DAB Service Area:

AM	FM
WJLK Asbury Park, NJ	WJLK Asbury Park, NJ
WHTG Eatontown, NJ	WHTG Eatontown, NJ
WOBM Lakewood, NJ	WSVU Long Branch, NJ
WMJO Seaside Park, NJ	WJRZ Manahawkin, NJ
	AL289 Manahawkin, NJ
	WADB Point Pleasant, NJ
	WOBM Toms River, NJ
	WMCX W. Long Branch, NJ
	* WBGD Bricktown, NJ
	* WKTW Dover Township, NJ
	* WCMJ Haslet, NJ
	* WBJB Lincroft, NJ

* -- Non Commercial

AM AND FM COMBINATIONS

AM	FM	LICENSEE
WJLK	WJLK	D & F Comm.
WHTG	WHTG	WHTG, Inc.
WOBM	WOBM	Seashore Brdcstg.

SUMMARY OF SCI'S SECONDARY MONMOUTH -OCEAN DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 16

Commercial	**:**	**12**
Public	**:**	**4**

Total Number of 4Mhz Channel Groups Needed to Accomodate Transition Under SCI Plan:

16 Signals Per 4Mhz	**:**	**2**
12 Signals Per 4Mhz	**:**	**2**

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SCI'S SECONDARY MIDDLESEX DAB SERVICE AREA

Includes the counties of:

NJ: Middlesex, Somerset, and Hunterdon

The following stations would be licensed to cover the Secondary Middlesex DAB Service Area:

AM	FM
WBRW Bridgewater, NJ	WAWZ Zarepath, NJ
WFHR Flemington, NJ	WMGQ New Brunswick, NJ
WCTC New Brunswick, NJ	* WDVR Deleware Twnshp,NJ
	* WCVH Flemington, NJ
	* WVPH Piscataway, NJ
	* WVHP Highland Park, NJ
	* WRSU New Brunswick, NJ

* -- Non Commercial

AM AND FM COMBINATIONS

AM	FM	LICENSEE
WCTC	WMGQ	Raritan Valley Brdcstg.

SUMMARY OF SCI'S SECONDARY MIDDLESEX DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 10

Commercial : 5
Public : 5

Total Number of 4Mhz Channel Groups Needed to Accommodate Transition Under SCI Plan:

16 Signals Per 4Mhz : 1
12 Signals Per 4Mhz : 2

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SCI'S SECONDARY BERGEN-PASSAIC DAB SERVICE AREA

Includes the counties of:

NY: Westchester, Orange, Putnam, and Rockland
NJ: Bergen and Passaic

The following stations would be licensed to cover the Secondary Bergen-Passaic DAB Service Area:

AM	FM
WPUT Brewster, NY	WSFM Briarcliff Manor,NY
WALL Middletown, NY	WKOJ Middletown, NY
WVIP Mt. Kisco, NY	WVIP Mt. Kisco, NY
WRKL New City, NY	AL296 Mt. Kisco, NY
WVOX New Rochelle, NY	WRTN New Rochelle, NY
WGNY Newburgh, NY	WGNY Newburgh, NY
WLNA Peekskill, NY	WNJV Patterson, NY
WDLC Port Jervis, NY	WHUD Peekskill, NY
WLIR Spring Valley, NY	WTSX Port Jervis, NY
WTBQ Warwick, NY	WFAS White Plains, NY
WFAS White Plains, NY	* WNYK Nyack, NY
WWDJ Hackensack, NJ	* WOSS Ossining, NY
WVNJ Oakland, NJ	* WARY Valhalla, NY
WKER Pompton Lakes, NJ	* WRRH Franklin Lakes, NJ
WKNJ Lakeside, NJ	* WRPR Mahwah, NJ
	* WYDU Teaneck, NJ
	* WPSC Wayne, NJ

* -- Non Commercial

AM AND FM COMBINATIONS

AM	FM	LICENSEE
WALL	WKOJ	The Wickham Group, Inc.
WVIP	WVIP	VIP Brdcstg.
WVOX	WRTN	Hudson Westchester Radio
WGNY	WGNY	Advance Brdcstg.
WLNA	WHUD	Radio Terrace, Inc.
WDLC	WTSX	Port Jervis Brdcstg.
WFAS	WFAS	CRB of Westchester

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SUMMARY OF SCI'S SECONDARY BERGEN-PASSAIC DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 32

Commercial	:	25
Public	:	7

Total Number of 4Mhz Channel Groups Needed to Accommodate Transition Under SCI Plan:

16 Signals Per 4Mhz	:	3
12 Signals Per 4Mhz	:	4

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APPENDIX B

SCI'S RECOMMENDED MSA MODEL FOR THE CONFIGURATION OF DIGITAL AUDIO BROADCASTING SERVICE AREAS

MARKET -- INDIANAPOLIS

MSA RANKING -- #37

COUNTIES COMPRISING MSA -- Boone, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan, and Shelby

PRESENT RADIO BROADCAST FACILITIES APPEARING IN THE INDIANAPOLIS MARKET

AM

WBRI Indianapolis, IN
WGRT Indianapolis, IN
WIBC Indianapolis, IN
WNDE Indianapolis, IN
WNTS Indianapolis, IN
WTUX Indianapolis, IN
WXLW Indianapolis, IN
WXTS Indianapolis, IN
WNCB Martinsville, IN

FM

WTLC Indianapolis, IN
WFXF Indianapolis, IN
WTPI Indianapolis, IN
WFBQ Indianapolis, IN
WFMS Indianapolis, IN
WKLR Indianapolis, IN
WSPL Greenfield, IN
WEMS Shelbyville, IN
WPSI Franklin, IN
WTTS Bloomington, IN
WSYW Danville, IN
WCBK Martinsville, IN
WXIR Plainfield, IN
*** WICR Indianapolis, IN**
*** WJEL Indianapolis, IN**
*** WAJC Indianapolis, IN**
*** WBDG Indianapolis, IN**
*** WEDM Indianapolis, IN**
*** WRFT Indianapolis, IN**
*** WYFI Indianapolis, IN**

*** -- Non-Commercial**

Sources -- Duncan's 1989 Market Guide
Duncan's Fall 1989 American Radio
Duncan's Technical Facilities of American Radio (1989 - 1990 Edition)
Rand McNally 1990 Commercial Atlas & Marketing Guide
The Broadcasting Yearbook, 1990
Standard Rates and Data Services, January 1, 1989
National Cellular Map, Comp-Comm, Inc.

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SUMMARY OF PRESENT STATUS

Total Number of AM Appearing in Indianapolis : 9

Commercial	:	9
Public	:	0

Total Number of FM Appearing in Indianapolis : 20

Commercial	:	13
Public	:	7

Total Number of AM/FM Appearing in Indianapolis : 29

Commercial	:	22
Public	:	7

SCI'S PRIMARY INDIANAPOLIS DAB SERVICE AREA

The following stations would be licensed to cover the Primary Indianapolis DAB Service Area:

AM

WBRI Indianapolis, IN
WGRT Indianapolis, IN
WIBC Indianapolis, IN
WNDE Indianapolis, IN
WNTS Indianapolis, IN
WTUX Indianapolis, IN
WXLW Indianapolis, IN
WXTS Indianapolis, IN
WMCB Martinsville, IN
WSVL Shelbyville, IN
WYIC Noblesville, IN

FM

WTLC Indianapolis, IN
WFXF Indianapolis, IN
WTPI Indianapolis, IN
WFBQ Indianapolis, IN
WFMS Indianapolis, IN
WKLR Indianapolis, IN
WZPL Greenfield, IN
WEMS Shelbyville, IN
WPZZ Franklin, IN
WBCI Lebanon, IN
WSYW Danville, IN
WCBK Martinsville, IN
WXIR Plainfield, IN
AL294 Greenwood, IN
AL230 Noblesville, IN
AL270 Brownsburg, IN
AL242 Indianapolis, IN
* WICR Indianapolis, IN
* WJEL Indianapolis, IN
* WAJC Indianapolis, IN
* WBDG Indianapolis, IN
* WEDM Indianapolis, IN
* WRFT Indianapolis, IN
* WYFI Indianapolis, IN
* WFCI Franklin, IN
* WHJE Carmel, IN

* -- Non Commercial

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AM AND FM COMBINATIONS

AM	FM	LICENSEE
WMCB	WCBK	Rodgers Brdcstg.
WXTZ	WFXF	Win Comm.
WTUX	WTLC	Panache Brdcstg.
WIBC	WKLR	Horizon Brdcstg.
WNDE	WFBQ	Taft TV & Radio

SUMMARY OF SCI'S
PRIMARY INDIANAPOLIS DAB SERVICE AREA

Total Number of DAB Signals (AM, FM, & Public) : 37

Commercial : 28
Public : 9

Total Number of 4Mhz Channel Groups Needed to Accomodate Transition Under SCI Plan:

16 Signals Per 4Mhz : 3
12 Signals Per 4Mhz : 4

APPENDIX C

SCI SPECTRUM PLAN FOR DAB

TERRESTRIAL (COMMERCIAL & PUBLIC)										NATIONAL SATELLITE	INTERNATIONAL SATELLITE				
1	2	3	4	5	6	7	8	9	10	To be determined.	11	12	13	14	15

CATEGORY	NEEDED SPECTRUM	TOTAL NUMBER OF 12 OR 16 SIGNAL, CHANNEL GROUPS	TOTAL NUMBER OF SIGNALS DEPENDING UPON 12 OR 16 SIGNAL SYSTEM
Terrestrial Spectrum (AM, FM, Public, and Complementary)	40 Mhz	10	120 - 160
International Satellite Services (VOA, Shortwave, etc)	16 - 20 Mhz	4 - 5	* 80 - 160
National/Regional Satellite	To Be Determined. This number is tied greatly to demand and economic viability		

* More signal capacity could be originated on these channel groups when voice quality only was required.

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Comment Letter
RM 90-6
No. 4

OFFICE OF COPYRIGHT
DEC 17 1990
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Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of

DIGITAL AUDIO BROADCAST AND CABLE SERVICES

Docket No.
RM90-6

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers ("ASCAP") submits these comments in response to the Copyright Office Notice of Inquiry regarding this matter. 55 Fed. Reg. 42, 916 (October 24, 1990).[1] The Copyright Office asked for comments on both the subject of digital audio services generally, and seven areas relating to these services specifically.

I. GENERAL COMMENTS

ASCAP is a performing rights society -- an unincorporated membership association of writers and publishers of copyrighted musical compositions. On behalf of its members and members of affiliated foreign performing rights societies, ASCAP licenses the right of non-dramatic public performance of the

[1] ASCAP, a founding member of the Copyright Coalition, also joins in the comments filed by the Coalition.

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copyrighted musical compositions in its repertory. See, generally, BMI v. CBS, 441 U.S. 1 (1979).

Throughout its 75 year history, ASCAP and its members have welcomed technological innovation: FM radio to television to compact discs. New technologies provide our members with improved means of communicating their works to the general public. These improvements serve the public good by providing opportunities for greater dissemination of copyrighted works, and greater opportunities for creators and copyright owners to receive remuneration for them, thus achieving the goals of the Copyright Law. In each such case we must remember that our copyright system makes reward to the author the means by which creation of new works is ensured, and the greater public good promoted -- "progress in Science and the useful Arts".

However, new technology can also threaten our members' livelihoods. Digital audio taping technology ("DAT") is very likely to result in rampant home taping which must not leave the creator and the copyright owner uncompensated. Like digital recording technology, digital audio services pose a grave danger to music rights owners. The substantial home taping losses now suffered by these creators are likely to increase dramatically with these services. A comprehensive, long-term solution to this problem must be devised now before digital services become the predominant means of audio transmissions.

ASCAP believes that the most equitable and efficient solution to this threat is the establishment of a taping royalty

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system akin to that in place in Europe and elsewhere, under which a license fee is paid on recording equipment and blank recording tape. ASCAP stands ready to play a useful role in the administration of such a system.

We turn now to the seven specific areas on which the Copyright Office requested comments.

II. SPECIFIC COMMENTS

(1) Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works? Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies or on television? To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?

There is little doubt that digital audio services will simplify and encourage home taping to the detriment of copyright owners. Coupled with DAT recorders or equipment employing one of the digital recording technologies on the horizon -- recordable and erasable compact discs ("CDs") or digital compact cassettes -- these services will enable the average listener to make pure, distortion-free copies of musical recordings without even the need to obtain a pre-recorded digital recording from which to copy.

The digital cable audio services specifically encourage home taping. They offer dozens of CD quality music channels across the broad spectrum of genres from classical to pop to country to rock to gospel. One digital cable audio service, Digital Planet, even provides a program guide to alert sub-

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scribers to hour long segments featuring the recordings of famous artists. The other digital cable audio services plan program guides. All digital cable audio services offer toll free numbers with program information. These program guides and information services enable the listener to record just what the listener wants. Indeed, modern home recording devices are able to record without the listener being present when the recording is made, through timing devices in the recorder. Very recently, newspapers in 24 cities have begun printing numerical codes next to television program listings which allow "one touch" programming of video tape recorders. These codes are obviously feasible for digital audio transmission services too.

The activities of digital cable audio services will undoubtedly lead to more home taping.

Digital audio broadcasting, when it comes, will also exacerbate the home taping problem. Digital audio broadcast services can be expected to take the same action as digital cable audio services to prompt the average listener to record copyrighted works. Today, widespread home taping from existing AM, FM and TV transmissions produces copies of progressively poorer sound quality. Tests of a European digital audio broadcasting system, on the other hand, have resulted in excellent sound quality, according to industry sources. Thus, a home listener would be far more likely to record digitally transmitted works because of the radically improved sound quality.

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Home video taping will also increase as sound quality improves. Indeed, the digital cable audio services already provide subscribers with digital simulcasts of cable program services such as MTV, VH1, HBO, Showtime, Cinemax and The Movie Channel.

It is impractical to monitor home taping of digital audio services. The first problem is the identification of the universe of those who are receiving digital audio transmissions. Neither digital audio broadcasters nor anyone else can identify those listeners. Digital cable audio services know who their subscribers are (although that knowledge may be in the possession of the local cable system operator, and not the digital cable audio service.) But, it is unlikely that they would be willing, voluntarily, to disclose those customer lists, which they might well regard as valuable proprietary information. Even if the digital cable audio services or the local system operators agreed to provide a list of subscribers to digital cable audio services, there would be no way of knowing which of those subscribers was taping and what was being taped.

It is also safe to assume that any attempt to question subscribers about their taping activities would be fruitless and, no doubt, regarded as a very objectionable intrusion on their privacy. The situation would be even more difficult, if that were possible, when radio and television broadcasts are digitally transmitted to the general public.

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It is also impractical technically to limit home taping. Manufacturers of digital recorders could be required by law to devise a system to prevent recording of digital services. However, as new recording technologies appear, new legislation would be required. More important is the fact, demonstrated time and time again, that whenever a system is devised to limit or prevent reception or recording of transmissions, it is only a matter of time before the system is circumvented. For example, several methods have already been developed for defeating the Serial Copy Management System devised by Sony for its DAT recorders.

(2) Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes or compact discs?

Yes. There can be no doubt that their will be a dramatic increase in home taping and that it will significantly displace sales of recordings of copyrighted works.

The Office of Technology Assessment has estimated that over one billion pieces of music are copied every year in this country and that fifty per cent of Americans have taped pre-recorded music from records, cassettes or compact discs. The Roper Organization estimates that analog home taping -- despite its inferior sound quality -- displaces the sale of some 300 million commercial sound recordings annually. Music industry losses are estimated to be as much as $1.9 billion per year.

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The recent Roper Organization survey on home taping and digital recording revealed that those who home tape now will tape more when they have a digital recorder and those who do not tape now will tape when they own a digital recorder. (A copy of the Roper survey, commissioned by the °Copyright Coalition, is attached as Exhibit "A".)

Thus, the pernicious effect of uncompensated digital audio transmissions will be compounded. Creators and copyright owners will lose the compensation for the recording of these transmissions, which is their rightful due under the Copyright Law, and they stand to lose sales of recordings.

(3) Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for compensation for transmission of his/her works? If not, could representatives of copyright owners, such as performing rights organizations, accomplish this task?

It is not feasible for individual copyright owners to negotiate with digital audio services for compensation for home taping losses. Although there are only three digital audio services now, there are likely to be thousands in the future when radio and television broadcasters generally begin digital transmissions. ASCAP (and, presumably, the other performing rights organizations) have the ability to undertake the licensing and distribution activities on behalf of the creators and copyright owners of the works rendered, if asked and authorized to do so.

Indeed, as discussed below, ASCAP and Broadcast Music Inc. ("BMI") have already licensed the existing digital cable

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audio services for the public performance of copyrighted musical compositions in their respective repertories. But those licenses do not extend to home recording of the works transmitted.

As to this specific question, we believe it is neither feasible nor equitable, in the long term, to negotiate compensation for home recording with the operators of digital audio services. It is simply not practical to monitor the extent of home taping through these services.

And, when all radio and television broadcasts are digitally transmitted, perhaps within the decade, the problems of negotiating and measuring the extent of home taping and the adequacy of compensation will multiply exponentially. We must also consider the question of the equity of licensing the right to record copyrighted works to the digital cable audio services, the cable operators who carry those services or digital audio broadcasters. These users are performing copyrighted music publicly, and certainly require a performing rights license. But, they are not making the recordings (although, in varying degrees, they may be seen as contributing to that activity). Rather, those recordings are being made by listeners and, in all fairness, it is the listeners who are ultimately profiting from the recording and who should, therefore, pay for it. Compensation should be the responsibility of those who make and benefit from the recordings.

(4) Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be

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distributed among copyright claimants? If so, who would be responsible for administering this process?

There is, we suggest, an equitable solution to the home recording problem which balances the competing interests of creators to be compensated for their work and the public to receive the benefits of improved technology. That solution is the payment of reasonable royalties on taping devices and blank recording tapes. Thirteen countries have already adopted this system in response to analog home taping. Seven countries (Australia, Austria, Finland, France, Hungary, Sweden and Turkey) base royalty collections on sales of blank analog tape. Six others (Germany, Iceland, Portugal, Spain, Norway and Zaire) base collections on both blank tape and recording equipment sales.

In addition, songwriter and music publisher groups throughout Europe and the International Federation of Phonogram and Videogram Producers (the international recording industry federation) have urged the European Community Commission to issue a directive that would require all member states to establish a system of remuneration for private analog and digital audio taping. The Commission is considering the proposal. To become binding, the Commission proposal would need approval by a weighted majority vote. Four of the twelve European Community countries, including two of the largest -- Germany and France -- have already approved their own royalty systems.

Taping royalties are typically shared among songwriters, performers and music and sound recording rights owners. American songwriters and rights owners now benefit from these

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foreign royalty payments. It is regrettable that American creators receive better treatment on this issue overseas than they do here.

If approved by Congress, this system would be efficient as well as equitable. Individual rights owners could not administer the system but the existing music licensing groups could easily handle the collection and distribution of these royalties.

(5) Should digital audio broadcasters be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for the possible copying of copyrighted works?

The scrambling of digital signals is only a stop-gap measure, and is not an appropriate long-term solution to the problem of home taping.

The three digital audio cable services now operating are fully encrypted. However, their audience is and will be limited to those cable subscribers who are willing to pay a monthly premium to receive the service. The most optimistic estimate of the size of this universe is five million subscribers, 10% of all cable subscribers. All cable services require some limiting technological device intended to prevent theft of service. But cable services are just one of many potential digital audio transmission services.

It will be impractical and inequitable to require the entire population to purchase descramblers when radio and televi-

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sion broadcasts generally are digitally transmitted. To do so would render hundreds of millions of radio and television receivers obsolete.

Perhaps more important, scrambling signals runs counter to the public policy interest of providing the public with enhanced technology and improved sound quality. Those members of the public who do listen to digital audio services, but do not record them, should be able to benefit from this technology.

The problems inherent in "scrambling" may be seen by the experience of cable program services transmitted through satellite carriers. Those problems -- political as well as technical -- necessitated a new compulsory license in the copyright law (17 USC §119). Home taping royalties provide a far better method of solving this problem.

(6) Describe existing and contemplative digital audio transmission services, including a description of (a) encryption systems, if any; (b) the means of transmitting prerecorded digital signals; (c) any plans to compress the digital signals; and, (d) any proposals concerning transmission of digital subcode information embodied on prerecorded works.

We have no information concerning the technical specifications of digital audio transmission services. We trust the services themselves will provide the Copyright Office with this information.

(7) Provide information relating to the business and commercial aspects of digital audio transmission services including (a) the current number of subscribers and predictions of future growth for existing digital cable services; (b) the anticipated start up dates and predicted audience size of proposed digital cable and

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broadcast services; (c) a description of the music channel offerings -- both existing and contemplated; (d) the availability of pay-per-listen services; and, (e) copyright licensing arrangements, if any.

To the degree we have the requested information, we are providing it herewith. Again, however, we suggest that the services themselves are the best source for this information, and assume that they will provide it to the Copyright Office.

Digital Cable Services

There are now three digital audio cable services. They are (1) Digital Cable Radio ("DCR"), operated by Jerrold Communications; (2) Digital Planet("DP"), operated by Digital Radio Labs; and, (3) Digital Music Express("DMX"), operated by International Cablecasting Technologies, Inc.

This year, DCR and DP launched their services in test markets in Willow Grove, Pennsylvania and Walnut Creek, California, respectively. DMX is expected to begin its service in early 1991 in San Francisco, Chicago, Seattle and Las Vegas.

All three are premium services; subscribers pay between $7 and $12 per month above their basic cable fee (including a rental fee of $3-$5 for use of the special digital tuner needed to receive the signal; some systems may offer a purchase option on the tuner). A description of each service and its plans for the future derived from promotional brochures, industry publications and discussions with the services, follows.

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DCR

DCR now offers two tiers of service -- DCR Basic and DCR Plus -- for approximately $7 and $11 per month, respectively. DCR Basic consists of eight twenty-four hour channels of commercial-free, CD quality music: The Hit List, The Country Channel, Solid Gold Oldies, Soft Rock, New Age\Contemporary Jazz, The Urban Beat and The Classical Channel. DCR Plus offers the above eight channels and the following nine additional channels: Big Band\Nostalgia, Easy Listening, Love Songs, Rock 2000, The Latin Channel, The Gospel Channel, The Childrens Channel, Hard and Heavy Rock and Spectrum (traditional, jazz, opera, folk and show tunes.) DCR Plus also offers simulcasts of eleven cable television program services like HBO, MTV and VH1. A remote control device is optional. DCR plans to offer a program guide. It now offers a toll-free number which provides title, artist and album information as each selection is performed. DCR employs no announcers on its channels.

DCR receives about one-third of the premium subscription charge, made by the cable system, an arrangement which is standard for cable premium services. The cable operator must pay about $80 for each tuner. Headend costs are about $18,000.

DCR can transmit at least ninety-six channels and DCR is planning to transmit pay-per-listen concerts and albums, talk radio, sports programs (baseball games from around the country) and domestic and foreign over-the-air radio programming.

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DCR now has only a few hundred subscribers, but some 1.25 million homes will have access to the service by mid-1991. DCR estimates a 7% to 10% buy rate and needs half a million subscribers to break even. It expects to reach that point in two to three years.

ASCAP and BMI have each licensed DCR to perform copyrighted musical compositions in their repertories. DCR's license arrangements with ASCAP are on an interim basis under the Amended Final Judgment which governs ASCAP's operations, pending the determination of reasonable license fees for cable program services in a proceeding captioned United States v. ASCAP, In the Matter of the Application of Turner Broadcasting Systems, Inc., et al. (Civ. No. 13-95, SDNY). The interim license fee, subject to retroactive adjustment when a final license fee is determined, is 15 cents per subscriber per year.

DCR has advised ASCAP that it has a three year license agreement with BMI providing for license fee payments that are a percentage of the retail subscription price and has proposed that ASCAP enter into a similar agreement.

DP

DP now offers its subscribers sixteen twenty-four hour commercial-free channels: Fresh Air (jazz, soft rock, new age), Four Seasons (classical music) The Cool Fire (jazz), Gems (standards), Cloud Nine (love songs), Sprouts (childrens' programming), Heartland (country music), The Artist Channel (half-

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hour segments featuring a particular artist), True Blue (oldies), Revolutions (rock and roll of the sixties and seventies), The Legends Channel (one hour segments featuring a particular artist), Currents (upbeat songs), The Star Channel (one hour segments featuring a particular artist), Rock Forward (new rock), Quake (new hit music), and Jams\The Quiet Storm (soul). DP also offers six simulcasts of cable television program services and four domestic and foreign over-the-air radio stations.

Unlike DCR, DP offers an extensive program guide as well as a toll free number. A copy of the December 1990 guide is attached as Exhibit "B".

The initial monthly fee to subscribers is $8, of which Digital Planet receives $3. Tuners cost approximately $85 and headend costs initially are $2,100.

The service has a capacity of 91 channels (theoretically, 1,026 channels, according to DP) and DP is planning to transmit additional childrens' programs, sports programs and approximately 35 domestic radio stations and 8 to 10 foreign over-the-air radio stations. Also planned are pay-per-listen and album channels; DP is discussing with Capitol Records a plan for Capitol to have its own channel which will offer interviews and current releases.

Like DCR, DP now has a small number of subscribers but it will be available soon in about 200,000 homes. DP projects that it needs about 200,000 subscribers to break even, and expects to reach that level in two years.

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DP's license arrangements with ASCAP and BMI are identical to DCR's.

DMX

DMX is not yet furnishing its service to the public; it expects to do so in 1991 with 30 narrowly programmed channels. For example, there are plans for three classical music channels, one each for operas, symphonies and chamber music. DMX also plans to target regional music needs e.g., Latin music in the Southwest and Miami. Simulcasts of cable television program services will also be offered. We have no information on specific channel offerings.

The initial monthly subscription fee will be between $7.50 and $8 of which DMX will receive $2.50. The tuners cost between $80 and $100 and headend costs run between $7,500 and $12,500.

DMX will also offer a remote control device which will have an LED read out telling the listener what piece is playing as well as a toll free number for program information and ordering CDs. Indeed, DMX is currently negotiating with a number of record labels to offer pay-per-listen channels and a CD sales service.

DMX plans to start in systems with almost 5 million households and hopes that the service will be available in 20 million homes by the end of next year. TCI, the largest cable

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multiple system operator, is working closely with DMX and may eventually become a minority owner.

DMX has agreed to the same license arrangements with ASCAP as those entered into by DCR and DP. We have no information concerning BMI's arrangements with DMX.

Digital Broadcast Services

A European digital broadcast system has been developed calling for digital audio broadcasting from satellites and land based towers. In the United States, three small companies have applied to the FCC to offer digital services by satellite. They are Satellite CD Radio of Washington (a subsidiary of Marcor, Inc.), the Radio Satellite Corporation of Pasadena, California and Strother Communications of Hammond, Louisiana.

Radio broadcasters are concerned about competition from digital broadcasting by satellite. The NAB adopted a Board resolution this year opposing introduction of digital radio transmitted by satellite. The NAB prefers a land based system so as to enable its members to convert from analog transmission to digital transmission more easily.

As the Copyright Office has noted, it is unlikely that any system for satellite or over-the-air digital broadcasting will begin operation until after the World Administrative Radio Conference meets in 1992 to consider setting aside frequencies for digital services.

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III. CONCLUSION

As the New York Times has noted, digital audio broadcast and cable services represent the greatest technological leap in audio transmissions since the introduction of FM radio technology in the late 1940s. ASCAP welcomes the technology because it provides a new and improved vehicle for the public performance of our members' works. However, the technology threatens to exacerbate the home taping problem. We urge the establishment of a taping royalty system akin to the system successfully administered in Europe and elsewhere to compensate for the significant losses sure to result from this technological advance. ASCAP stands ready to play a useful role in helping to

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find and administer a solution to the problems raised by this newest technological revolution.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

Bernard Korman
ASCAP
One Lincoln Plaza
New York, N.Y. 10023
(212) 621-6210

Of Counsel: Ross Charap

I. Fred Koenigsberg
White & Case
1155 Avenue of Americas
New York, N.Y. 10036
(212) 819-8806

Dated: December 15, 1990

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GENERAL COUNSEL
OF COPYRIGHT
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Comment Letter
RM 90-6
No. 5

IN THE UNITED STATES COPYRIGHT OFFICE

Response to Notice of Inquiry:	)	
	)	**Docket No. RM 90-6**
Digital Audio Broadcast and Cable Services	)	

To the Honorable Ralph Oman, Register of Copyrights:

COMMENTS OF THE HOME RECORDING RIGHTS COALITION

Pursuant to the Notice of Inquiry in Docket No. RM 90-6, filed October 23, 1990 and published in 55 Fed. Reg. 42916 (Oct. 24, 1990), the Home Recording Rights Coalition ("HRRC")[1] respectfully submits these comments for the record in the Copyright Office Study of Digital Audio Broadcast and Cable Services ("DAB").

The Notice of Inquiry posed a number of questions. Taking the liberty of summarizing, they are:

1. **Will DAB "prompt" more home taping by average listeners**

   -- **more than from AM, FM, or TV?**

   -- **can habits be monitored and restrained technically?**

2. **Would the home taping from DAB significantly displace album sales?**

---

[1] The HRRC is a coalition of consumers, manufacturers and retailers of audio and video recording products dedicated to promoting the public's right to use recording equipment for their personal edification and entertainment. Member manufacturers include 3M Co., Ampex Corp., BASF Systems Corp., International Jensen, Inc., JBL Inc., Matsushita Electric Corp. of America, North American Philips Corp., Sears, Roebuck & Co., Sony Corporation of America, Tandy Corp. and Thomson Consumer Electronics, Inc. Trade association members include the American Counsel for the Blind, Electronic Industries Association, and National Association of Retail Dealers of America.

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3. Could copyright owners or organizations representing them practically negotiate with DAB owners / operators for compensation for DAB transmission?

4. Should a royalty be put on recording media or on digital recording equipment, and if so, how should it be administered, and by whom?

5. Should DAB broadcasters be forced to scramble broadcasts, and should some (additional) charge be made for home copies?

Simply put, the HRRC answers to these questions are as follows: No, No, Yes, Absolutely Not, and No.

1. No. There is no evidence that DAB will "prompt" or otherwise cause any listener to change his or her home taping practices:

-- making radio digital will not make it more likely to be copied, just as digitizing TV will not make TV any more likely to be copied. Why should it?

-- listeners' habits probably could be monitored to a frightening extent, but this would be inordinately expensive and would be unwarranted, inconvenient and offensive for the average listener.

2. No. Home taping from DAB would not, on balance, displace album sales, just as other forms of home taping do not, on balance, displace sales. The OTA did find, however, positive evidence that home taping tends to stimulate sales.

3. Yes. Once mandatory government restrictions are out of reach, copyright holders will recognize many ways to license copyrighted materials -- some possible only because of DAB.

4. Absolutely not. Any royalty tax, whether collected through technical monitoring devices or through old-fashioned taxation, would be unwarranted and unfair and would impose costs on all consumers, whether they tape or not.

5. No. Mandatory DAB scrambling and conditional access for recorders would "fix" two systems that are not broken. The market for broadcast radio would be ruined by scrambling, and the extra, extra charge for recorder operation would add insult to injury.

INTRODUCTION

The particular questions posed in this Inquiry seem to be based on two assumptions, neither of which is supported by a whit of evidence: (1) that digital technology has some necessary implication for home recording, and (2) that home recording should be viewed as a matter that needs to be remedied in copyright law. While HRRC would not question the right of the Copyright Office to conduct such an inquiry, we are very concerned that these assumptions, which we believe are both wrong, should form the basis for this study.

Digital Technology Should Not Be Studied Or Treated Differently From Analog Technology.

By focusing this inquiry on digital technology, without having first studied more fundamental points about home taping and broadcasting, the Office seems to have made an unwarranted jump. From a copyright standpoint, there is no legal or logical difference between copying from analog or digital sources. If home recording from broadcasts over the past few decades has been a problem, the Office first should study taping from analog radio and television broadcasts. If for some reason government-mandated technological interference with broadcasting may be appropriate, the Office should study the virtues, costs and effects of technological mandates applied to existing technology.

HRRC is concerned that the Office may be starting with digital broadcasting for an all too simple reason: a measure restricting digital broadcast and recording technology, or using DAB subcodes

to collect funds as well as deliver signals, is being considered now primarily because it seems possible. Yet doing something because it seems possible, rather than because it is fair, well considered, and in accordance with previous practice and existing law, is the worst reason to undertake a policy initiative.

If this proceeding is to be other than a facile shortcut, it should build on the recent Office of Technology Assessment ("OTA") studies of new technology and home taping practices.[2] These impartial and exhaustive studies, by a sister agency of the Congress, found no evidence that home taping should be considered a problem, or creates a need to revise copyright law, and no evidence that new technology makes any difference whatsoever in home taping practices. Yet, the Notice of Inquiry makes no mention of these recent and comprehensive studies. Indeed, the questions seem formed from the contrary points of view that home taping is certifiably illegal or problematical, and that home taping from digital sources may be "worse" than home taping from analog sources.

Private, Noncommercial Home Taping is Legal.

In light of the assumptions apparent in the Inquiry's questions, HRRC feels obliged in these Comments to emphasize

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[2] U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302 (Melbourne, FL: Kreiger Publishing Co., April 1986); U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, DC: US Government Printing Office, October 1989) (hereinafter "OTA Report"; tables of survey results in Appendix C to the OTA Report are cited as "OTA Survey, Table ___").

strongly an important and fundamental point: Home taping from broadcasts is clearly legal under the Copyright Act. The fundamental legality of private, noncommercial home taping was expressly preserved by Congress. The Supreme Court affirmed in the particular context of home taping from broadcasts, where the consumer is invited to listen to broadcast copyrighted material free of charge, that such home taping is legal and unlikely to displace sales.

Consumer Practices Should Not Be Examined In Lieu Of Commercial Uses.

HRRC also is concerned that the Office has not established an appropriate hierarchy with respect to performance royalties for commercial use of sound recordings and royalty taxes upon home taping by consumers. If Congress is unwilling to impose royalty fees upon those who exploit recorded works for commercial gain, there certainly is no basis to advocate royalty taxes for private, noncommercial home use recording.

This study may represent a shortcut in additional ways. The comments received by the Federal Communications Commission in response to its Initial Notice of Inquiry into digital audio broadcasting[3] showed that the very nature of digital audio broadcasting is as yet an open question. Basic decisions remain as to the quality, systems, and methods of transmission. Without

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[3] Establishment and Regulation of New Digital Audio Radio Services, General Docket 90-357, FCC 90-281, Notice of Inquiry published in 55 Fed. Reg. 34940 (Aug. 27, 1990).

first knowing what digital audio broadcasting services will be, it is difficult, at best, to study their impact.

Having made these vital points, we of course turn to answering the Office's questions in the form in which they were stated.

HRRC RESPONSE TO COPYRIGHT OFFICE QUESTIONS

Question 1:

> Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works?
>
> Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies, or on television?
>
> To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?

HRRC Answer:

1. No. There is no evidence that DAB will "prompt" or otherwise cause any listener to change his or her home taping practices:

   -- making radio digital will not make it more likely to be copied, just as digitizing TV will not make TV any more likely to be copied. Why should it?

   -- listeners' habits probably could be monitored to a frightening extent, but this would be inordinately expensive and would be unwarranted, inconvenient and offensive for the average listener.

The assumption that just because something is digital it is more likely to be copied, so therefore ought to be treated differently, is mischievous at best. Applied to the real world, it immediately creates problems and incongruities:

-- It might be "infringement" to record music from digital radio, yet be perfectly lawful to use a VCR to time-shift record the very same music from free television broadcasts on "Great Performances" or "Friday Night Videos."

-- The legal status of time-shift VCR recording, confirmed by the Supreme Court, would change if television broadcasters adopt digital transmission; indeed, it would change if they just adopt digital audio transmission.

-- A consumer would be able to escape copyright infringement simply by using an analog recorder instead of a digital tape deck, even though recording the same piece of music.

-- Consumers could be held liable for infringement by taping copyrighted dramatic or public affairs programming on digital equipment, whereas no objection had ever been interposed to taping on analog equipment.

-- Controlling a broadcast, because it is digital, when some of the source material itself is analog makes no sense. Taking just one example, what of dance music in which the instrumental track was digitally recorded, but the lip-synch vocal was done on analog?

If new legal distinctions were to be based upon sound quality, prior technological improvements also should have been determinative, as a matter of law. For example:

-- Audiophile analog tape recorders could be subject to royalty taxes and technological restrictions, while cheaper

decks would be freely permitted. Yet most complaints about home taping are aimed at "kids," not adult audiophiles.

-- Owners of analog tape recorders also would be liable if they can't hear the difference between digital and analog recorders.

-- It would be unlawful to tape television programs broadcast in MTS stereo, but not in monaural.

There Is No Support For The View That Digital Broadcasting Will "Prompt" Home Taping.

Fortunately, these incongruities do not arise because, in fact, there is no evidence that technical progress in general, or the transition to digital technology in particular, means much, or anything, with respect to home taping or copyright law. Voices within the recording industry itself, speaking candidly, have recognized that new technology is good for the industry, but beneficial or irrelevant insofar as home taping is concerned.

Capitol Records recently became the first record company to form its own digital audio cable channel, the Capitol Records Channel, as part of the Digital Planet cable music service. Using digital audio tape, Capitol will compile one-to-two hour genre-specific segments to promote its own artists.[4] Yet, according to the respected music industry publication Billboard magazine, Capitol Records "is not worried about home taping of the Capitol

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[4] Capitol Records releases include classic albums by Frank Sinatra and The Beatles, as well as current best-sellers by popular rock artists Bonnie Raitt, Steve Miller Band, Heart and Duran Duran, rapper M.C. Hammer, pop singer Anne Murray and country artists Eddie Rabbitt and Garth Brooks.

Channel's broadcasts. [Executive vice president Art Jaeger] says that it should not be any more extensive than current home taping off of radio programs."[5]

Technical Progress Has Been Good to the Recording and Music Industries.

Capitol Records' willing acceptance of home taping from even digital broadcasts is not at all surprising. Home taping promotes rather than displaces record sales. Although home taping has been a common practice for some 20 years, the music and recording industries continue to post banner revenues year after year. Somehow, every improvement in technology is a cloud that turns out to be all silver lining.

For example, RIAA reported that in the first half of 1990, industry shipments rose nearly 11 percent compared with the first half of 1989, representing a half billion dollar increase in revenue ($3.5 billion versus $3 billion). See Inside RIAA, Fall 1990, at 7; Nunziata, "RIAA: Trade Soared in First Half," Billboard, October 13, 1990, at 1. Unit sales and dollar revenue figures were led strongly by sales of audio cassette tapes. Moreover, strong increases were shown in the number of gold (million-dollar sales) and multi-platinum (multi-million units sold) record certifications in the first half of 1990 over the first half of 1989. Id.

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[5] Nunziata, "Capitol Takes to the Airwaves Via Own Digital Cable Radio Channel," Billboard, June 30, 1990, at 93 (emphasis added).

Similarly, the National Music Publishers Association ("NMPA") reported that its total revenues moved last year for the first time over the $3 billion mark, more than $1.05 billion of which was from the United States market alone. Lichtman, "Worldwide Pub Revenues Hit $3 Bil in 1989," Billboard, October 6, 1990, at 1, 85. According to NMPA President Ed Murphy, these increasing revenues were attributable to the beneficial effect of new technologies, such as compact disks, cable television and satellite delivery services, which stimulated greater usage of copyrighted music. Id. at 85. As Billboard noted, "[t]he music publishing industry's take of $3 billion is about 15% of the estimated $20 billion in revenues generated by the recording industry worldwide." Id.

Quality is Not a Big Factor in Radio Taping Practices.

Despite the great advances in technology that have brought music to everyone, OTA found that home taping levels remained stable in the 1980s. OTA found that only 27 percent of those surveyed taped music from radio or television broadcasts at all during the prior year. OTA Report at 152-153. A larger percentage of those surveyed, 32 percent, had made voice recordings (i.e., recordings other than from broadcasts or prerecorded media) in the prior year. See OTA Survey, Table 9-1 at 277. Significantly, more than half of those surveyed, 54 percent, said they never had recorded music from radio or television broadcasts. Id., Table 5-5 at 262.

The reasons why consumers do not prefer to tape from broadcasts are obvious, and bear no relationship to the quality of

reception. Taping music from the radio is time-consuming, inconvenient and tedious, requiring essentially the constant attention of the taper.[6] Consumers rarely know when a station will broadcast the music they wish to tape. Most music stations induce listeners to stay tuned by repeating popular songs at unscheduled intervals; very few stations publish program schedules. Thus, recording from broadcasts requires the taper first to wait for the desired music and then to omit recording unwanted commercials and announcers.[7] Announcements or station jingles regularly intrude

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[6] The impact of the time required for such copying is demonstrated in an economic context by a contractor paper prepared for the OTA study. Economist William R. Johnson concludes "that an individual's choice between copying and buying originals is affected by the value of his time -- higher values of time raise the number of purchases of originals and reduce the extent of copying." OTA Report at 184; see William R. Johnson, "Estimating the Effect of Copying on the Demand for Original Creative Works," (Mar. 3, 1989) (report prepared for the Office of Technology Assessment) ("Johnson report"). Digital broadcasting will have no effect in this respect until humans program themselves digitally, as well.

[7] "Zapping" of commercials or announcements, a somewhat common practice for viewing time-shift recorded videotapes, is impractical in the context of audio taping. While videotape viewers can fast-forward the tape and see on-screen when the desired program resumes, audio listeners can only guess. Fast-forwarding of audio tapes is completely impractical and even dangerous for playback in automobiles which, as the OTA found, is the reason why 21 percent of those surveyed made home tapes. OTA Survey, Table 7-1 at 271.

Dubbing from one tape to another to edit out commercials or announcements is prohibited by digital tape recorders equipped with the Serial Copy Management System, which allow only first-generation recording from digital broadcasts. Dub-editing is possible using analog tape recorders, but essentially defeats the gains in audio quality achieved from digital broadcasting.

Recording entire broadcasts more likely displaces broadcast listening rather than music purchases. As previously noted, recordings made from regular broadcasts with announcers are

BEST COPY AVAILABLE

over the introductions and endings to popular songs, and render the end-product of broadcast taping unsatisfactory for all but the least discriminating consumers.[8]

Improvements in sound quality have little impact on home taping. Many consumers are satisfied with present levels of analog sound quality;[9] others prefer it.[10] OTA found that only one-third of consumer tapers were aware of the most basic technological distinctions affecting the sound quality of recordings, such as the grade of blank tape used for recording. OTA Report at 146, 160. Similarly, developments in recording technology such as dual-cassette and fast-speed dubbing decks also were found by OTA not to influence consumer taping habits. Fifty-nine percent of dual-

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not effective substitutes for prerecorded product. Recordings made from digital cable broadcasts without announcements likely would be satisfactory only for those who only desire background music with little or no concern for particular music or artists.

[8] For these reasons, and because of an obvious lack of spending power, approximately one-third of all broadcast taping is done by persons between 10-14 years of age. OTA Survey, Table 5-9 at 264.

[9] As Consumer Reports recently observed in reviewing digital audio tape recorders:

> Electronic measurements are precise, but they don't necessarily tell you whether human ears can hear or appreciate the difference between two sounds. Good as the instruments say the sound of DAT is, chances are that many people would find the sound of a good conventional tape deck good enough.

"Digital Audio Tape Decks," Consumer Reports 660, 661 (October 1990).

[10] The magazines Stereophile and The Absolute Sound, share the view that analog recordings and equipment often sound better than digital technology.

cassette tape deck owners had recorded no homemade tapes at all. Id. at 161. The number of home tapes made by the general public and those owning decks with dual-deck or fast-dubbing capabilities was virtually the same. Id.

In short, sonic improvements from digital broadcast technology will not change the human factors that principally affect home taping. Therefore, it is illogical and unreasonable to presume that the current level of home taping somehow will mushroom because of digital radio technology, or that the music or recording industries suddenly will be hurt by such home taping when no demonstrable injury has occurred for more than 20 years.

Home Taping Has Remained Constant As Technology Has Grown.

Indeed, the amount of home taping from any source has remained stable. A substantial majority of those surveyed by OTA (60 percent) said they had not taped any prerecorded music in the prior year. OTA Survey, Table 5-1 at 260. Only 28 percent reported making such a tape in the prior three months. Id., Table 5-3 at 261. Comparing these results with a 1982 Yankelovich, Skelly and White survey of home taping, OTA found the rate of home taping was "virtually identical." Id.; OTA Report at 151.[11] There is no

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[11] RIAA in the past has claimed that the OTA survey "found" that "[o]ver one billion musical pieces are copied every year." Response to the Office of Technology Assessment study, "Copyright & Home Copying: Technology Challenges the Law", (1990) (unpublished report). The OTA study supports no such claim.

RIAA's selective reading of the OTA survey data omits the explicit OTA report caution that "the survey data support a broad range of estimated values depending on the data items and methods used." OTA Report at 154 (emphasis in original). RIAA also

reason to believe that a new radio technology will prompt home taping when such fundamental changes as the personal stereo and compact disc revolutions made little or no impact on home taping habits.

Home Taping Is Legal; There is No Reason to Assume that Any Home Taping is a Problem Under Copyright Law.

By focusing its inquiry on the amount of taping and its consequent purported effect on the potential market for recordings, the Copyright Office seemingly applies a fair use analysis. This raises the danger of overlooking a fundamental fact: in enacting copyright protections for sound recordings Congress exempted home taping from the rights of copyright holders.

Legislative History: Home Taping Not Meant to Be Covered

The legislative history of the copyright law shows that Congress clearly intended to create a safe harbor for private, noncommercial home audio taping. In 1971, Congress first granted copyright protection to sound recordings, "to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound

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overlooks that OTA estimated the number of "tapings," not the number of musical pieces recorded, and was careful to point out that its estimates did not refer to the number of tapes made or the number of albums or album equivalents taped. Id. at 149, 154.

Moreover, RIAA ignores the evaluation by one of the economists reviewing these data for OTA that "self-reported taping rates are not compatible with industry sales figures" for blank tape. Johnson Report, supra n.6, at 11. Total blank tape sales for 1988 totalled 360 million units, and this figure includes tapes sold for business purposes or for taping uncopyrighted material.

recording, ..." H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 1 (1971), reprinted in 1971 U.S. Code Cong. & Admin. News 1566. Consistent with its intention to restrain commercial piracy, Congress articulated an explicit exemption for consumer home taping for private, noncommercial purposes:

Home Recording

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

H.R. Rep. No. 92-487 at 7, reprinted in 1971 U.S. Code Cong. & Admin. News at 1572. As one court observed, shortly after enactment of the Sound Recording Act, "[t]he House Report accompanying the bill, as well as hearings before Subcommittee No. 3 of the House Judiciary Committee, reveals that Congress was particularly concerned with combatting extensive pirating of phonograph records and tapes and clearly did not intend to extend coverage of the bill to . . . home recordings." Elektra Records Corp. v. Gem Electronic Distributors, Inc., 360 F. Supp. 821, 824 (E.D.N.Y. 1973) (footnotes omitted; emphasis added).

This exemption of home taping from the scope of copyrights has never been revisited or amended by Congress either explicitly by statute or implicitly through legislative history.

Private Home Taping Is A Noninfringing Fair Use.

Although the statutorily exempt practice of home taping does not depend upon the "fair use" doctrine to justify its legality, it is clear that home taping from broadcasts is a legitimate noninfringing activity under fair use analysis as well. Floor debate by the proponents of the 1971 Sound Recording Act supports the view that private home taping was so considered by the Congress:

> Mr. Kazen: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> Mr. Kastenmeier: Yes.
>
> Mr. Kazen: In other words, if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of the bill?
>
> Mr. Kastenmeier: This is not included in the bill. I am glad the gentleman raises the point.
>
> On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use.

117 Cong. Rec. 3748-49 (1971) (emphasis added). The legislative history of the 1976 Act reports that the purpose of enacting section 107 on fair use was to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5680; S.Rep. No. 473, 94th Cong., 1st Sess. 62 (1975). The Senate Report

similarly confirms that off-the-air recording for convenience should be deemed fair use. S.Rep. No. 94-473 at 65-66; see Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984). Thus, even if viewed as a fair use, the legitimacy of home taping has been incorporated and reaffirmed in the 1976 Copyright Act and has remained untouched in subsequent congressional proceedings.

Home Taping From Broadcasts is Fair Use.

The legality of home recording from audio broadcasts was even more clearly affirmed by the Supreme Court in Sony Corp. v. Universal City Studios. In the directly analogous context of off-the-air videotape recording for personal use, the Supreme Court held that home taping is a legitimate activity -- "a paradigmatic noninfringing use" -- that cannot and should not be prevented by copyright holders. Id., 464 U.S. at 446 n.28. Home taping is presumptively a fair use because it is a noncommercial, nonprofit activity that merely enables a consumer to enjoy a work that he or she has been invited to enjoy free of charge.[12] Id., 464 U.S. at 449.

A fair use analysis shows that home taping of broadcasts violates neither the spirit nor letter of the copyright law because:

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[12] Under the 1976 Copyright Act, the copyright owner of a musical work is entitled to royalties for a public performance of the work. However, this right does not extend to copyright owners of sound recordings. In either case, the right does not extend to private performances of a work, which would logically encompass the playing of home tapes. 17 U.S.C. § 101.

(1) The character of home taping is private and personal rather than commercial or profit-oriented. Home tapers are not in business to reap huge financial profits at the expense of the music industry. Such commercially motivated conduct, or "piracy," is clearly proscribed by the copyright law. Home tapers, by contrast, make tapes from broadcasts for their private convenience and enjoyment.

(2) Selection taping, in which individual pieces from different works are combined to create a customized tape, constitutes a substantial portion of home taping activity. The OTA survey suggests that tapes made from broadcasts were almost exclusively comprised of selections, and that a scant eight percent (8%) involved taping of entire albums. OTA Report at 155.

(3) Home taping provides consumers with a product not available commercially, rather than serving as a substitute for prerecorded albums. For example, consumers create home tapes for the convenience of portability, longer playing times, durability, and personalized selection of music. Consumers record live or prerecorded concert events being broadcast over the free airwaves and not being offered for sale. These tapes do not compete in the marketplace with copyrighted works and therefore do not devalue copyrighted works in any way.

(4) OTA confirmed the stimulative effects of home taping. Home taping tends to promote rather than to displace sales of

copyrighted works. OTA found that its survey supported the stimulative effects of home taping in two distinct ways.

First, approximately one-fourth (24 percent) of persons who purchased music in the prior year reported that they had heard either the artist or that particular music on a home tape before their purchase. OTA Report at 159; OTA Survey, Table 8-11 at 276. Particularly important, according to OTA, is that the home tape did not discourage subsequent purchases in these cases, and that the home tape promoted rather than displaced the sale. OTA Report at 159. Home taping as a grassroots means of promoting music can be especially valuable to new or "underground" artists whose works receive little or no radio and television airplay.

Second, OTA found a stimulative effect from consumers who purchased the recording with the expectation of taping from it. Id. Even so, OTA found that fewer actual tapings occurred than expected tapings: 14 percent bought a recording intending to tape from it; only 11 percent actually did. Id.

(5) Consumers' own attitudes toward home taping overwhelmingly demonstrate their belief that home taping is fair to both consumer and copyright interests. OTA Report at 163-165. Between 62 and 75 percent of those surveyed by OTA believed that taping for personal use is acceptable. OTA Survey, Table 11-2 at 281. Sixty-three percent of those surveyed thought current home taping practices were fair to the music and recording industry; only 30 percent thought such practices even slightly unfair.

Compare OTA Survey, Table 11-5 at 283 with id., Table 11-8 at 284.[13] Notably, OTA found that those respondents who were more critical of music copying had not purchased any recorded music in the past year. OTA Report at 164.

Consumers' belief that private, noncommercial home taping is fair is based on principle, not expediency. An equally compelling 76 percent of those surveyed considered it unfair to make tapes for sale. OTA Survey, Table 11-2 at 281.

Monitoring of Consumer Taping Habits Is Unnecessary, Technologically Infeasible, Unacceptable and Potentially Invasive of Consumer Privacy Interests.

The question posed by the Copyright Office concerning the ability to monitor consumer taping habits encompasses two separate issues: the extent to which taping habits can be monitored, versus the extent to which they should be monitored. The case for monitoring or otherwise addressing any home taping by means of governmental intrusion has yet to be made. But if the end justified the means, the means would be unpleasant indeed.

Even if shown to be technologically feasible, such monitoring would extract a huge price. Assume that a "smart card" system with an imbedded integrated memory and microprocessor circuit would be mandated for all recording equipment. It would read and keep track of digital codes in broadcasts recorded onto digital equipment. As a "convenience" for consumers, the cards would be downloaded at

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[13] While 46 percent believed current practices "perfectly fair," only 17 percent responded that home taping was "not at all fair" to the music and recording industries. Id.

tens of thousands of locations across the country. Or, receivers of broadcasts would have to be plugged "on-line" into a national grid -- including those listening and recording in cars and with boom boxes and personal stereos. To be accurate, the cards would track whether a consumer taped the entire work or only part of it, or taped over the recorded work without ever listening to it.

Monitoring Technology Would be Invasive and Expensive.

"Smart card" technology does not yet exist, thank heavens. Yet it is not the technology, but the means and purpose, that would be offensive. An extensive infrastructure would have to be mandated by law, since no broadcaster,[14] manufacturer or retailer would willingly develop and implement such a system. To develop and then install such a system would require billions of dollars of initial investment; and, one way or another, the massive costs of such a system would be passed on to the consumer through the purchase price for the cards, higher prices on recording equipment or recordings, unfair and unnecessary royalty taxes or all of the above.

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[14] Broadcaster comments in response to the FCC Inquiry almost uniformly emphasize the need to minimize the number of bits per second being broadcast and thereby reduce the signal bandwidth. Smaller bandwidth would both lower the cost of transmission and maximize the available broadcast spectrum. To the extent such a monitoring system would require transmission of significant amounts of additional data, it clearly runs contrary to the needs of broadcasters and the broadcast system as a whole.

American Consumers Would Never Buy or Accept Recorders that were Subject to Monitoring.

American consumers simply will not accept either the cards or the recorders equipped with such a system. Fundamentally, they will resent the intrusiveness of Big Brother monitoring their personal habits and methods of expression.[15] Consumers accustomed to lawfully taping off the air for their own private use will stick with existing analog equipment rather than purchase digital recorders or subscribe to digital services. Those who already purchased digital recorders will most certainly refuse to have their recorders retrofitted. Consumers will reject the continuing burden and inconvenience of "recharging" the cards.

There Would be Strong Incentive to Circumvent the System.

Consumers will have an extraordinarily strong incentive to circumvent the system, particularly if the system were tied to royalties. Any technical system, no matter how sophisticated, can be circumvented if sufficient motivation exists to do so. The urge to outsmart a nasty smart card, foisted on their own recorder, which prevents consumers from doing something they strongly believe they are entitled to do, will be overwhelming.

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[15] The privacy implications of such monitoring are no different than those safeguarded by Congress in the Video Privacy Protection Act of 1988. There, Congress protected the privacy interest of individuals in their choices of videotapes to rent. Just as Congress and the public were outraged to learn that video rental lists were daily being solicited for marketing purposes and other improper reasons, the Copyright Office should equally be offended by any attempt to systematically collect information concerning what Americans purchase, listen to and tape.

Unintended Consequences Would Cripple Technology.

The unintended but certain consequence of compelling manufacturers to install card systems in recorders will be to cripple digital technology. Feeding the consumer revolt would be the fact that recorders would have to be large enough to accommodate a mechanism by which the card would be inserted and would be read, permanently limiting manufacturer flexibility to innovate in both the size and shape of digital recorders. These creative design and manufacturing processes are essential to the consumer electronics industry and to consumers' ability to enjoy using their recorders. Indeed, the development of "Walkman"-style personal stereos and "boom boxes" immeasurably contributed to the skyrocketing sales of prerecorded analog compact cassette tapes.

No Technological Limitations Should Be Imposed On Home Taping.

The question as to what technological limitations on home taping are feasible gainsays the fact that technological limitations are not justified. The Copyright Office accurately answered this question some 20 years ago when Assistant Register of Copyrights Barbara Ringer testified before Congress, "I do not see anybody going into anyone's home and preventing this sort of thing [home taping], or forcing legislation that would engineer a piece of equipment not to allow home taping." Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess, 22-23 (1971) (emphasis added). Technological restrictions against home taping then and now are bad public policy.

OTA Found Huge Social Costs From Technological Limitations on Home Recording.

OTA found that the cost to society of technologically prohibiting home taping would greatly outweigh even the most extreme claim of injury to the music and recording industries. See OTA Study at 191-207. One need not be an OTA consulting economist to realize this. Consumers have become accustomed to home taping for personal uses over the last 20 years. Many consumers record selections from recordings they have purchased to make "party tapes" for their own convenience, just as teenagers used to stack 45 rpm singles onto a spindle. Homemade tapes can be a form of individual expression, combining music to convey moods or ideas. Consumers use home tapes to analyze musical compositions or to develop musical skills -- whether it be a pianist tackling a difficult passage of Liszt or a young rapper taping his message over a favorite instrumental break.

Technical restrictions on home taping would be elitist in every sense. Digital recording promises to be a great equalizer. It offers amateur and aspiring musicians the promise of high quality recordings at minimal cost. In a Commentary in Billboard magazine, Jac Holzman recently reminded the music industry of the need to place professional recording technology in the hands of the people:

> The ever-wider availability of affordable recording equipment of high quality has again given smaller independent companies and garage musicians the chance to record themselves and to create regional, independent companies consistent with their own taste and sense of mission.

"Big Egos Don't Help Label Executives; This Industry Is About Music," Billboard, November 29, 1990, at 9.

Mr. Holzman should know. Forty years ago as a college student, Jac Holzman founded Elektra Records because of then-recent innovations such as the lp record and the portable reel-to-reel tape recorder. His passion for music and unknown artists preserved the music of folk legends such as Josh White, popularized the protest folksong movement of the early 1960s, and championed the rock sounds of The Doors. His insight remains right on target today. One of the most successful records of 1989, "The Trinity Sessions" by the Canadian group Cowboy Junkies, was recorded in a church on a simple DAT recorder, using a single stereo microphone.

A recent article in Rolling Stone spoke of the impact digital technology will have for music composers, as well:

> Where's it all heading? Toward the ability to integrate a digital recording system [into a home computer]. Completed songs will be transferred directly onto a digital storage medium like R-DAT. Very shortly we'll all be able to make CDs of our own music at home.

Di Perna, "Digital Composing; Get Ready To Play Your Computer Like A Virtuoso," Rolling Stone, November 15, 1990, at 167.

To suddenly deny consumers these rights they have freely enjoyed for 50 years sends the wrong message. It brands the public at large as thieves. It perverts the promise of advanced technology, rather than promotes the progress of science and the useful arts for the public good. It is, as we say, elitist.

The public has, however, indicated willingness to accept a reasonable, non-elitist middle ground. The Serial Copy Management

System ("SCMS"), already implemented in DAT recorders being sold in the United States, is acceptable to the hardware and recording industries, and appears acceptable to broadcasters and the consuming public as well. As described in the Technical Reference Document that accompanied the Digital Audio Tape Recorder Act of 1990, SCMS-equipped DAT recorders would not prevent the making of first-generation recordings from digital sources, including broadcasts, but would prohibit making further digital-to-digital copies of copies. This system, as proposed, would rely on a "default" setting in the digital receivers themselves, so would require no special coding on the part of broadcasters.[16]

This compromise, although not mandated and not yet enacted into law, is an example of how it is possible to respect the rights of consumers without imposing elitist restrictions.

Question 21

Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes or compact disks?

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[16] The International Electrotechnical Commission standards for implementing the Serial Copy Management System require that digital broadcast receivers that issue subcode information in an IEC 958 interface signal (capable of being recorded by consumer digital audio tape recorders) must indicate in the output signal that the broadcast material is protected by copyright (unless intentionally overridden by the broadcaster) and that the material is of an original generation status. These same standards would be mandated under United States law by the Digital Audio Tape Recorder Act of 1990, and the Technical Reference Document incorporated therein by reference and published in 136 Cong. Rec. E376 (Feb. 26, 1990). See also, infra notes 28-29 and accompanying text.

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HRRC Answer:

2. No. Home taping from DAB would not, on balance, displace album sales, just as other forms of home taping do not, on balance, displace sales. The OTA did find, however, positive evidence that home taping tends to stimulate sales.

Would a new artist or recording group really wish that consumers did not have access to tape recorders at home? Obviously not, because anyone interested in music knows that:

-- most albums today are sold in the format of prerecorded audio tape, and played back on home recorders or portable or automotive tape players

-- had it not been for the home recorders, there would never have been the portable and automotive tape players.

The observation that the recording industry's most efficient format, which has led it to record-breaking profits, owes its life and start to home taping, is intuitive and difficult to prove -- it is difficult to measure today the impact on the market of purchases of tape recorders, and of home taping, that occurred 20 years ago. One can, and the OTA did, however, measure a secondary proposition: that even on a current basis, home taping transactions are directly linked to subsequent album purchases.

If Anything, Home Taping Tends to Stimulate Rather than Displace Sales.

The OTA Report confirmed in virtually every major respect the findings of HRRC's 1982 Yankelovich study that home tapers are the recording industry's best customers and that nothing about their practices seems inherently threatening to recording industry sales.

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OTA found that to make a theoretical "upper-bound" estimate of possible gross displacement, it had to make clearly unrealistic, hypothetical inferences about answers to hypothetical questions. It then arrived at the possibility that perhaps one-fifth (22 percent) of home taping transactions would have any potential to displace a sale. OTA observed that even this gross figure was certainly "excessively high."[17] OTA Report at 158.

OTA's data from questions about actual taping practices supported the results from HRRC's 1982 Yankelovich survey strongly and in detail: most people tape primarily from their own albums and keep both the original and the copy, and many album purchases in fact were promoted by previous home taping.

While OTA found the survey data on purchase stimulation were insufficient to quantify the impact of home taping on purchasing, OTA verified the existence of the "stimulative influence of home taping on music purchases," and that home tapes "must be considered to have some promotional value." Id. at 159. OTA found that:

-- Twenty-four percent of all purchases were of artists or music heard previously on a home tape; and 14 percent

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[17] In essence, this figure is based on the assumption that if people had not made a tape from their own album, they might have bought a second copy! OTA found this 22 percent estimate unreliable largely because it was based upon responses to a series of hypothetical questions such as whether they would have bought the material if unable to tape it, or whether their purchase would have been in addition to or instead of other purchases. Id. Obviously, people are more willing to spend hypothetical dollars than actual dollars, and would neither shop for nor find everything that they already owned and, hypothetically, would have considered buying in duplicate.

purchased the recording with the expectation of taping from it. Id.

-- "The survey findings clearly indicated that music tapers were also music purchasers, and vice versa. Moreover, they also suggested that frequent tapers also tended to be frequent buyers." Id. at 155.

Taping from One's Own Collection

OTA confirmed the prime Yankelovich finding that most people tape from their own collections for their own personal use. Almost 65 percent of tapers copied recordings from their own collection or from their immediate family. OTA Survey, Table 6-10 at 270. The most common motivation cited by home tapers -- by an overwhelming 81 percent -- was to copy recordings they already purchased for the purpose of "place-shifting," i.e., to play tapes on portable equipment. Id., Table 7-4 at 274. The second most common reason given by 67 percent of respondents was to create customized programs of musical selections. Id. The third most common reason, by 46 percent, was to protect originals from damage or wearing out. Id.

Saving money is not an important consideration to home tapers. A mere three percent of respondents gave saving money as the primary reason for taping. Id., Table 7-1 at 271. OTA found that "only 13 percent of music tapings by adults from prerecorded formats were attributed to making tapes of friends' recordings 'so

that they don't have to buy them.'" OTA Study at 157.[18] Making tapes to give to others similarly was considered "a marginal activity." Id. at 158.

Home Tapes Are Not Fungible With Commercial Albums, For Reasons Other Than Sound Quality.

Home tapes cannot be perfect substitutes for commercially recorded products, whether the tapes are made from broadcasts or records, tapes or compact discs. Albums include liner notes, lyric sheets, artist information, photographs and album art. Many recordings include posters, photographs, fan club information or product flyers. Others offer inducements to purchase the recording in a particular format, such as additional songs included on the compact disc that do not appear on the tape or album. Still others offer a "free" tape of the recording with the purchase of the compact disc. Indeed, packaging is so important to sales that one of the fiercest debates in the recording industry today is whether the "long box" through which CDs are sold should be replaced by some environmentally gentler package. Geffen Records recently estimated that a new release from which it was omitting the "long

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[18] Interestingly, while 41 percent of all tapers said they at some point had made a tape from friends' recordings "so that they don't have to buy them," 36 percent of all tapers also said they probably would not have bought the recordings if unable to tape them. OTA Survey, Table 7-4 at 274. Moreover, borrowing of recordings itself appears to be extremely uncommon. Only one percent of the recordings most recently listened to by survey respondents was a borrowed recording; and even the highest incidence of borrowing (among 10-14 year olds) was only eight percent. Id., Table 3-13 at 257.

box" would sell only half as many copies as it otherwise would have.

One of the most striking and surprising OTA findings was that even though equal numbers of albums and home tapes may be available, consumers listen to home tapes much less often than to prerecorded albums. Only about 12% of the recordings to which respondents last listened were home recorded tapes. OTA Survey at 150. Of these, less than three-and-one-half (3 1/2) percent were tapes made from radio broadcasts. OTA Survey, Table 3-14.[19] Thus, tapes from broadcasts are much more often made than played back.

Clearly, in the hands of the consumers who made them, home tapes are not fungible with prerecorded albums -- if they were, consumers would be just as content to listen to them, and would spend much more time listening to tapes made from broadcasts or borrowed recordings than OTA found that they did. OTA Report at 156. The data instead indicate that while many consumers love to tape, they strongly prefer to listen to their albums, even though they do not consider their albums to be of any better sound quality. Hence, home taping transactions do not create album

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[19] Similarly, fewer than three (3) percent of the recordings listened to last were home recorded tapes from recordings others owned. OTA Survey, Table 3-14. Furthermore, many homemade tapes contained material that could not have been purchased in the same form. Only 51 percent of the home recorded tapes last listened to contained an entire album, and only 29 percent of these tapes contained entire albums with no selections. This implies that only about 1 to 1.4 percent of the recordings respondents last listened to were tapes of albums owned by others that respondents might have been able to purchase. OTA Survey, Table 3-15 at 258.

equivalents, so are not at all likely to displace new album purchases.[20]

The Sales Displacement Parade of Horribles Has Never, In Fact, Arrived.

In light of the OTA findings, it should not be surprising that none of the "parade of horrible consequences" from home taping consistently forecast by the recording and music industries, has ever arrived:

-- Despite the flat prediction in the early 1980s that analog cassette home taping would mean that the industry would never sell ten million copies of any album again, the first half of 1990 alone produced 45 multiplatinum awards. A short time after this prediction, Michael Jackson's Thriller sold 36 million copies.

-- The fear that home taping or dual-deck cassette recorders would hurt the market for prerecorded tapes proved to be the opposite of the truth. In 1990 RIAA replaced vinyl records with analog cassettes as its standard measure of record sales. Analog compact cassette sales went up five percent in the first half of 1990, accounting for 63 percent of industry shipments.

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[20] Much the same conclusion was reached by OTA consulting economist William Johnson who noted: "Given the rate of copying and the size of the stock of copied tape, it is surprising that when asked about the last recorded music listened to, only 10% reported listening to copied tape. This finding may indicate that people copy music they are less interested in (and would be less likely to buy)." Johnson Report, at 11.

-- The commonly-heard canard that home taping "hurts new artists" also is the opposite of the truth. Many of the biggest hits of the past few years have been by first-time recording artists such as Paula Abdul, Mariah Carey, Tracy Chapman, Taylor Dayne, M.C. Hammer, Vanilla Ice, Nelson, Wilson Phillips and Lisa Stansfield. The newest complaints from the industry are that established acts, such as Bruce Springsteen and Michael Jackson, have no new releases; and that sales of rock music are rapidly declining in the face of the success of rap, dance and heavy metal records.[21]

Unless the government steps in to "fix" something, digital broadcast technology will not "do in" the recording or music industries, either. Technology opens new markets and methods for artist exposure, music distribution and industry profits. Live AM radio broadcasts increased audiences for big band dance concerts and opera. FM radio spread the gospel of album rock. Analog compact cassette recorders created the market for prerecorded cassettes. Television programs such as Young Peoples' Concerts, American Bandstand and MTV whetted teenagers' appetites for live concerts. The videocassette recorder, which was supposed to put Hollywood out of business, is now embraced as its best friend. It created a new product for the music industry as well -- prerecorded

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[21] Di Martino and Duffy, "Rock Losing Grip As Other Genres Gain," Billboard, Nov. 10, 1990, at 1. If the industry does finally hit a lull, as dance music runs its course and another style does not quickly emerge, the costs of fashion and recession will, of course, again be laid at home taping's door.

music videotapes, whose sales nearly doubled over the last year. Inside RIAA, Fall 1990, at 7. Indeed, the major threat facing the record industry today seems to be its own pricing policies, not home taping.[22]

Question 3:

> Would a copyright owner have the practical ability to negotiate with the owners/operators of digital radio services for compensation for transmission of his/her works?
>
> If not could representatives of copyright owners, such as performing rights organizations, accomplish this task?

HRRC Answer:

> 3. Yes. Once mandatory government restrictions are out of reach, copyright holders will recognize many ways to license copyrighted materials -- some possible only because of DAB.

Copyright Holders Can Profit Handsomely from Digital Audio Services.

Radio traditionally has been the major marketing tool for copyright holders. OTA found that 79 percent of those surveyed heard the artist or the work on radio or television before purchasing their recordings. OTA Survey, Table 8-11 at 276. For artists and composers, broadcasting has been a major source of revenues through performance royalties. As previously noted, NMPA

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[22] According to Billboard, record retailers had asked the record industry to boost sales by lowering compact disc prices; the record industry has responded instead by hiking analog cassette tape prices to a $10.98 list. Christman and Miller, "All Wound Up About Cassette Prices; Retailers Say $10.98 Releases May Hurt Biz," Billboard, Dec. 8, 1990, at 6. Retailers fear the industry move will cause significant erosion in tape sales and, ultimately, could threaten the viability of the analog tape format.

President Edward Murphy attributes much of the record $3 billion in revenue for composers to the growth of new technologies such as music television and satellite broadcast services. Lichtman, "Worldwide Pub Revenues Hit $3 Bil in 1989," Billboard, October 6, 1990, at 85.

Copyright holders entitled to performance royalties currently negotiate with broadcasters through rights administration organizations. Digital broadcasting does not alter either the copyright principles guaranteeing them remuneration or the means of collecting such royalties through performing arts groups.

Digital radio opens new avenues for profit to the recording industry as well. Record companies already are testing new strategies to exploit digital broadcast technology. As previously noted, Capitol Records has started its own digital cable channel to promote its artists. One digital broadcaster, International Cablecasting, has announced a novel service for both its customers and the recording industry -- a remote control unit that displays details about what is being played, and gives a toll-free telephone number to call and order the compact disc. Lublin, "Cable TV To See If Cable Radio Means Sweet Music For Revenue," Wall Street Journal, November 6, 1990, at B-10. "'The record industry is hot for that' promotional idea, says W. Thomas Oliver, International Cablecasting's president. It's advertising that 'never interferes with your music listening.'" Id.

Digital radio's capacity to serve a widespread satellite audience will make new radio formats commercially viable and,

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thereby, will create new channels for music that otherwise might not be heard on commercial airwaves. These possibilities may be of greatest benefit to small, independent artists and record labels who will find through digital broadcasting the means of distributing their works without the high overhead costs associated with duplicating and distributing albums.

As the HRRC also has advised the FCC, any claim that the digital radio "celestial jukebox" means the sky is falling is dead wrong; in truth, the sky's the limit. The recording industry, musicians, songwriters, broadcasters and American business all stand to benefit handsomely from this new technology. As the Supreme Court recognized in Sony Corp. v. Universal City Studios, new technologies may require some adjustments in marketing strategy for copyright holders, but give no reason to presume harm to copyright holders' interests. 464 U.S. at 454. Copyright holders in the past have proven more than capable of harnessing new technologies to their benefit, and already are planning new ways to profit from digital broadcasting.

These opportunities will become most apparent and attractive once the dream of a government-guaranteed levy stream has been put to rest.

Performance Royalties for Commercial Users Should Be Considered Before Taxing Private, Noncommercial Home Taping.

In two sets of comments before the Federal Communications Commission, RIAA has pressed the Commission to advocate or adopt administratively a performance royalty right for copyright holders of sound recordings. Before turning to the question of whether

consumers should pay for recording broadcast performances, however, it should be determined whether this performance right ought to exist; and then, if it is determined that such a right should exist, whether payment for this right should come from the broadcasters who make commercial use of copyrighted works or their listening audience.

HRRC takes no position on issues arising from commercial practices, such as whether a performance royalty right for sound recordings is justified. However, the determination by Congress not to grant such a right[23] points to a more fundamental policy issue for this Inquiry with respect to consumer practices: If Congress is unwilling to restrict or tax broadcasters, restaurants and dance clubs, whose commercial use is not subject to any obligation to provide direct financial incentives to the recording industry, then restrictions or taxes against private, noncommercial uses most certainly should not be considered.

Sound recordings are broadcast freely and repeatedly over the airways to all those who possess the means to receive them. Preservation of such broadcasts by private home taping for personal use is merely one type of reception, with no more impact on the music industry than repeated broadcasting by a radio station. Not only is commercial broadcast of music exempted from payment, but,

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[23] While RIAA calls the denial of such a right a "historical anomaly" under copyright law, it was, in fact, a deliberate decision that Congress made when it originally granted rights to sound recordings in 1971, and made again when it revamped the Copyright Act in 1976, and made again in 1978 when it specifically considered this issue.

indeed, radio stations are given recordings for free. Surely it must warp priorities to ignore this industrial profit-bearing use, yet consider taxing the private consumer/listener.

If the music and recording industries believe they are entitled to additional revenues, they should first ask Congress for the right to performance royalties from those businesses that benefit commercially from their works, rather than seeking to impose royalty taxes upon those who purchase them. But if Congress is unwilling to grant royalties for commercial uses of sound recordings, there is no reason to impose or advocate royalty taxes upon noncommercial home taping.

Question 4:

> Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be distributed among copyright claimants? If so, who would administer the process?

HRRC Answer:

> 4. Absolutely not. Any royalty tax, whether collected through technical monitoring devices or through old-fashioned taxation, would be unwarranted and unfair and would impose costs on all consumers, whether they tape or not.

Royalty Taxes Are Neither Legally Nor Factually Justifiable.

After years of study and debate and, finally, an impartial OTA survey, there remains no evidence that home taping, on balance, is any threat to the constitutional purpose of copyright. Nor is there any evidence to suggest that digital technology suddenly will change this fact. Nor is there any reason to think that significant displacement of sales has occurred or may occur because

of taping from broadcasts. Therefore, there is no reason to consider changing the law and imposing an unnecessary and unpopular burden on consumers.

Royalty Taxes Are Inherently And Irremediably Unfair To Consumers.

In addition to being unnecessary, taxes on recorders or blank tape would be simply unfair. The OTA found that a clear majority of consumers who own cassette recorders use them almost exclusively for playing back prerecorded tapes they purchased. Fifty-nine percent of the public taped no music from any prerecorded source in the prior year. OTA Survey, Table 5-1 at 260. Fifty-four percent said they never had made a tape from radio or television broadcasts. Id., Table 5-5 at 262.

A demographic breakdown of home taping habits reveals that the burden of royalty taxes against recording equipment would fall disproportionately upon older Americans. Ninety percent of respondents 65 years of age and older use their equipment only for playback, and a mere 10 percent of these respondents recorded music from any source in the prior year. Id., Table 5-1 at 260. Only 15 percent of respondents in that age group reported they had ever made recordings from radio or television, and nine percent reported that such tapings occurred more than a year prior to the survey. Id., Tables 5-5 and 5-6 at 262-63.[24]

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[24] One-fourth of past year tapings by persons 65 years of age and older were audio tapes made from televised concert broadcasts. OTA Survey, Table 6-1 at 269.

Taxes on recording equipment and blank tape also indiscriminately penalize those who record their own original works and noncopyrighted materials. Given the particular importance and promise of digital technology for those interested in composing and recording their own music, any royalty tax against either recorders or blank tape would deter rather than encourage individual creativity and would contradict the constitutional foundations of the copyright laws.

As OTA stressed, the significance and prevalence of taping of noncopyrighted materials should neither be underestimated nor ignored: "The taping of noncopyrighted material occurs more frequently than the taping of prerecorded music. Perhaps <u>three-fourths of taping occasions involved taping something other than music.</u>" OTA Report at 146 (emphasis added); OTA Survey, Tables 9-4 and 9-9 at 278-79; <u>see also</u> OTA Report at 160.[25] Sixty-two percent of consumers record materials other than from broadcasts or prerecorded software. OTA Survey, Table 9-1 at 277. OTA found that voice recording was especially common among younger people. OTA Report at 160. More than half (53 percent) of respondents between 15 and 19 years of age made home voice recordings in the prior year, as did 49 percent of those between 10 and 14, 42

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[25] Even a biased survey performed for the self-styled "Home Copyright Coalition" found that nearly half (48 percent) of those interested in owning a DAT recorder would not use it at all for recording; and that 60 percent of those interested in recording would tape <u>both</u> non-copyrighted and copyrighted materials. The Roper Organization, Inc., "Report on Home Audio Taping and Projected DAT Use," June 1990 at 11-12.

percent of those between 20 and 24, and 36 percent of those between 25 and 34. OTA Survey, Table 9-1 at 277.

Royalty taxes severely hurt those who rely most heavily upon recording equipment and blank tapes -- visually impaired Americans whose exposure to copyrighted works depends upon open and inexpensive access to tape recorders and books on tape.

Royalty Taxes Will Neither Compensate Nor Encourage Creative Artists, And Are Unnecessary To Support The Thriving Music And Recording Industries.

Even if the levying of royalty taxes were justified by either law or fact, or were fair to the consuming public, the distribution of royalty tax revenues would not serve the avowed purpose of compensating and encouraging artists.

As an initial matter, of course, the revenues from royalty taxes must be split among groups of copyright holders. ASCAP and BMI, the major non-profit performing rights organizations in the United States, retain about 18-19% and 15-16% respectively of total revenues to cover operating expenses. Such administrative costs would come off the top of these royalty taxes and thus significantly reduce the slice of the pie going to songwriters and performers.

As to that portion of the tax revenue stream for copyright holders in sound recordings, most copyrights to sound recordings are held by record companies, not by the artists themselves. The major record companies are owned by highly diversified multinational conglomerates. There is no guarantee that any portion of the royalty taxes being picked from the pockets of

consumers will trickle down to the pockets of composers and performers, or would be invested in music rather than some other business.

The method of distribution itself gives even less comfort to aspiring artists. If the distribution of royalty taxes is based on record sales or airplay, then the government is taxing the poor to give to the rich -- those acts already reaping the greatest sales profits, like Madonna or New Kids on the Block. Truly aspiring artists whose work gets little or no radio airplay would suffer in several ways -- they would receive virtually none of the royalty taxes collected; the taxes would deter home taping, which acts as a significant promotional device for unknown or "underground" artists; and these artists themselves would pay the taxes on the recorders and blank tape they use.

There is also evidence emerging that levy systems imposed in Europe on video and audio tapes and recorders are dampening the demand for both hardware and prerecorded software.

The Theoretical "Debit Card" System Is Technologically Unworkable, Unduly Expensive, Equally Unfair And Fundamentally Unacceptable To Consumers.

The Copyright Office in recent months has suggested the alternative of a "debit card" system to remedy the recognized inequities of taxes on blank tape or recording equipment. Yet such a system is just as unfair, and has additional flaws as well -- this cure is not only worse than the alleged disease; it is worse than the other "cures."

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Debit card systems are equal parts theory and theology, like high-tech weapons on the drawing board. While interested parties praise feasibility and virtues, no one yet has constructed one. Indeed, no one yet has articulated precisely how the system technically would work, how royalty taxes would be assessed, or how royalty taxes would be calculated, collected or distributed.

Practically, there seem to be two ways in which such a system could be implemented. One would involve a "smart card" with an integrated circuit embedded in it. A consumer would buy the card and insert it into a digital recorder. The card would note and store identifying information as to the albums being copied. This card would then be read by a terminal (probably located at the same place where the card was purchased), which would send the data to a collection and distribution organization. At the terminal, or elsewhere, the consumer would pay to recharge the card to enable the taper to make additional copies.

A second hypothetical version, suggested by the Register of Copyrights, would at least conceptually be somewhat simpler. A card with a magnetic strip, similar to that used in the Washington-area Metro system, would be purchased by the consumer. The consumer would insert the card into the DAT recorder before copying. The recorder would debit a preset amount for each copy made, for each taping episode, or on a minute-by-minute basis. When the card was exhausted -- even if in the middle of a taping episode or the middle of the night -- it would have to be replaced.

Even if such an intrusion were acceptable in principle, either system obviously would be difficult to implement, and cumbersome in practice.

The Costs of Developing Either Debit Card System Would be Prohibitive And Unfairly Foisted On Manufacturers and Consumers.

Although the money collected from these debit card systems would go to the music industry, it is the manufacturers of consumer electronics equipment who would probably be compelled to develop them, at enormous expense. Thus, the true economics of such a system would be masked.

Implementing the "smart card" alternative would be particularly expensive. A nationwide network of stand-alone terminals linked by telecommunications circuits for recharging cards and for reading and collecting information about home taping practices would rival the national network of automatic teller machines. Proponents of a debit system have not said who would bear these extraordinary costs.

If the music industry were forced pay to construct, maintain and police the debit card system, the costs would almost certainly exceed the industry's revenues from the system. Only by passing on such costs -- initially on the manufacturers, so ultimately on the buyers of recorders -- could the system appear economic even for those it is designed to benefit.

Manufacturers should not be required to bear the costs of developing a debit system for the benefit of the music industry. This would particularly be the case when the system will diminish

the commercial value or desirability of all digital receivers and digital audio tape recorders. Allocation of these costs to manufacturers, and hence their customers, would be unconscionably unfair.

Consumers should not be required to finance the development, implementation and maintenance of such a system. Because consumers would have to pay for what they now obtain as part of the purchase price of prerecorded music, it is insult enough to force them to pay for new royalty taxes. Consumers would only be further outraged at the knowledge that, one way or another, they would be paying up front for the technological means to tax themselves -- even if they never tape prerecorded copyrighted materials.

Consumers Will Reject Debit Card Systems As Inconvenient, Invasive and Unfair.

Debit card systems require a giant leap of faith to believe that consumers could possibly accept them.[26] Debit systems aptly have been described as "a parking meter in your driveway." Consumers accustomed to portable recording technology will object to the increased size and weight imposed by the debit card technology.

The inconvenience of the debit card system would be most felt by consumers living in rural, suburban or residential areas, where terminals or retail outlets may not be close by. Such consumers

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[26] Indeed, the HRRC invites the Copyright Office to conduct the following experiment: Tell someone in an informal setting about what would be required of them by the debit card system. Record their views on government monitoring of or interference in personal home practices.

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would be required to make long trips simply to be able to use their own recorders. Should a home taper be forced to drive distances in the middle of the night if he or she wishes to tape at home and has run out of units on a debit card? Or would such consumers be forced to over-buy in advance, and hope they do not lose their six-months' supply before it can be used?

For many consumers who work, the debit system would be extremely inconvenient, unless the means for recharging or purchasing debit cards were available on a twenty-four hour basis. If the cards will be sold in stores, shoppers already irritated at waiting in line will be further infuriated as debit cards are sold, tallied and recharged.

Levying of Royalty Taxes Through Debit Cards Is Every Bit As Unfair As With Other Schemes.

Putting impracticality aside, the proposals overlook two fundamental facts: a glitzier approach to royalties does nothing to justify them; and the American public will simply never buy debit-card tape recorders unless circumvention is assured. As OTA found, most Americans are very comfortable with the fairness of their home taping practices. If these practices suddenly become outlawed, or subject to technologically-imposed taxing schemes, consumers would be given every emotional and economic incentive to circumvent, fold, spindle and mutilate these debit cards -- assuming, of course, that they would buy such recorders at all.

If taping is tracked according to composition, and artist, consumers rightfully would bristle at the idea that either the

government or private commercial interests would have lists of precisely what they taped and when. The system, to be fair, would also have to monitor by the minute, or else the charge for Beethoven's Ninth Symphony could be the same as that for a short popular song. Still, the problems with such a system are obvious. If someone tapes the beginning of a song and makes a mistake or is interrupted, are they charged twice? Must they mail in a form for a refund?

Conversely, if royalty taxes are <u>not</u> assessed according to a precise per-artist, per-song basis and instead are based on a per-minute transaction fee, then the system would only create an expensive technological infrastructure to distribute the taxes to wealthy performers, raising costs for tapers and nontapers alike. It would be no more fair than other generalized royalty tax schemes. People who tape only Mozart would have their royalty tax dollars go in part to The 2-Live Crew -- whether they personally wish to support that group financially or not.[27]

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[27] Furthermore, it bears note that any royalty tax tied directly to taping would largely levy a tax on teenagers -- a result Congress specifically intended to avoid in granting rights to sound recordings, as evidenced by the previously-cited comments of Reps. Kazen and Kastenmeier, and the following colloquy between Rep. Biester and Assistant Register of Copyrights Ringer:

> Rep. Biester: I can tell you I must have a small pirate in my own home. My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set. ... [T]his legislation, of course, would not point to his activities, would it?
>
> Ms. Ringer: I think the answer is clearly, "No, it would not."

Question 5:

Should digital audio broadcasters be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for the possible copying of copyrighted works?

HRRC Answer:

5. No. Mandatory DAB scrambling and conditional access for recorders would "fix" two systems that are not broken. The market for broadcast radio would be ruined by scrambling, and the extra, extra charge for recorder operation would add insult to injury.

Encryption Is Contrary To The Fundamental Purpose and Mandate of the Free Broadcasting System.

The value of the free broadcast system has been proven over and over. Scrambling or encryption would convert the United States system of free commercial broadcasting to one of possibly universal

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Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess, 22-23 (1971).

OTA found that almost two-thirds of all home taping from broadcasts is done by those aged 10-to-19, 33 percent by those aged 10-to-14 alone. OTA Report at 152; OTA Survey Tables 5-6 and 5-9 at 263-264. Moreover, OTA supported the obvious fact that such teenagers have the least ability to pay for prerecorded music, and that teenagers borrow more recordings and purchase fewer recordings than older respondents. OTA Survey, Table 3-13 at 257.

Nevertheless, musical acts targeted specifically at children are among the most successful despite the fact that two of the biggest draws, New Kids on the Block and Teenage Mutant Ninja Turtles, both lip-synch on stage. In addition to zesty record sales, these groups also prosper through sales of clothing, lunchboxes, dolls, toll telephone lines, television programs, videos, posters, trading cards, comic books and even breakfast cereals. See "Don't Believe The Hype," Rolling Stone, Dec. 13, 1990, at 70. Home taping can't be hurting them much. Would their producers really wish that no one owned a tape recorder?

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pay-per-performance. There is no evidence that the presently successful free system needs to be converted to a pay system.

The National Association of Broadcasters, in its response to the FCC Notice of Inquiry into digital audio broadcasting, went out of its way to combat the severe threat posed by encryption to the American broadcasting system:

> [A]lthough RIAA has not raised this proposal in the instant FCC inquiry, we strongly oppose the notion that digital audio broadcasting should operate only on an "encryption" or "scrambled" basis. To adopt such restrictions, the Commission would move in a direction completely opposite to that which the Communications Act directs it to proceed. This country's over-the-air broadcast service is based upon an advertising-supported and "free" system. To require the American public to pay directly for enhanced quality audio would appear strongly at odds with these basic statutory requirements. Moreover, any such limitations, be they of a quasi-copyright nature or otherwise, would pose serious implications not only for American broadcasting, but for the Commission's overall communications policy. That is, the matters raised by RIAA are not simply "copyright issues." They go to the very heart of the domestic system of over-the-air broadcasting. Any adopting of the RIAA's principles here would have a direct adverse impact not only on broadcasters, but also on the listening public and on the Commission's statutory responsibilities.

Comments of the National Association of Broadcasters, FCC Gen. Docket No. 90-357 at 29 (emphasis added). The NAB concluded that mandatory encryption and other RIAA-suggested restrictions on broadcast freedom, in the name of copyright protection, "(1) only would inhibit the establishment of a digital audio service and (2) would place untoward and unconstitutional limits on the broadcast of information to the American audience." Id. at 30.

HRRC agrees.

Encryption Would Defeat The Essential Benefits of Digital Audio Broadcasting.

Advocates of encryption support a fundamental misconception of what is truly important about digital radio. For most consumers the greatest benefit of digital broadcasting is improved reception, not "compact disc quality sound." Farmers and rural broadcasters support digital audio broadcasting specifically because it will enable them to receive radio programming. Metropolitan broadcasters advocate digital transmission systems because they will eliminate interference from tall building structures and other transmission sources. Trucking and labor associations praised the idea of nationwide reception as a boon to those who regularly drive cross-country with little or no consistent means of information and entertainment.

For some, the importance of digital radio is its potential to serve the entire United States. Nationwide coverage will enable broadcasters to provide cultural and public affairs programming to minorities who lack significant constituencies to support localized station programming. Regional performers, such as local symphony orchestras, will be able to reach larger audiences nationwide and thereby build and enhance their national reputations (with concomitant benefits in increased concert dates and record sales). Others, concerned with our local broadcast tradition, want to keep local broadcasters competitive with these advances.

Encryption or scrambling would work a tremendous disservice to everyone looking forward to digital radio. Scrambling would mandate that every digital receiver, including car radios and

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personal stereos, be equipped with de-encryption devices adding needless expense, size, weight and complexity. Encryption likewise imposes additional design, cost and production burdens upon consumer electronics manufacturers.

It is difficult to envision the utility of encryption in practice:

-- If each channel uses the same encryption method, the purpose of encryption is defeated.

-- If each channel uses a different system, digital receivers would become expensive and encumbered with descrambling technology. Consumers would reject the inconvenience, and digital broadcasting itself would be defeated.

-- If there is only a small charge for receiving encrypted broadcast services, then revenues collected on behalf of copyright owners would not justify the cost of encryption.

-- If encrypted broadcast services are expensive to receive, then digital audio broadcasting will become an elite medium only for the wealthy, and its manifold benefits of improved reception and diversified programming will be lost. Moreover, legislative and enforcement mechanisms would be required to ward off circumvention and unauthorized reception.

-- If royalty taxes for copyright holders are taken from fees for encrypted broadcast services, then radio listeners who were not tapers would bear the brunt of the tax burden.

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-- If encryption somehow is used as part of a technical means to directly tax only tapers, such as by a debit card, then it suffers from the same problems previously described concerning all systems of royalty taxes.

Ultimately, the more intricate and costly the medium, for both broadcasters and consumers, the fewer the benefits that will be reaped from digital audio broadcasting. Digital audio broadcasting should proceed, consistent with the mandates of the Communications Act, as part of the system of free broadcasting without encryption.

HRRC is particularly concerned with the precedent that would be set by encryption of digital audio broadcasts, and conditional access for recording. If this is appropriate for digital audio, why not for digital video, which surely is coming as well? In a world in which it costs extra to receive television broadcasts, and extra again to activate a VCR, the enormous benefits, for everyone, of the VCR revolution would be practically and unnecessarily forfeited. Yet this is precisely where the notion of encrypting radio broadcasts, because they are digital and because encryption is possible, leads.

Question 6:

Describe existing and contemplated digital audio transmission services, including a description of (a) encryption systems, if any; (b) the means of transmitting prerecorded digital signals; (c) any plans to compress the digital signals; and (d) any proposals concerning transmission of digital subcode information embodied on prerecorded works.

HRRC Answer:

Digital Subcode Information Should Be Optional, Not Mandatory.

The only digital subcode information that should be mandated for broadcast on digital audio services are those subcode data necessary for reception of the broadcast signal.

Comments submitted to the FCC show that RIAA hopes that subcode data would be manipulated to impose a system of "accounting" and "collection and/or distribution of royalties." Why should this be required? Copyright law does not impose royalty taxes on either broadcasting or home recording of broadcast music. RIAA attempts to impose performance royalties or royalty taxes on blank tape and/or recorders have been rejected soundly by Congress. Thus, RIAA's attempt to mandate royalty and collection subcodes is, at best, highly premature and, at worst, an attempt to impose administratively what has been beyond achievement legislatively.

Indeed, it is not necessary for broadcasters to transmit subcode data even relating to the operation of the Serial Copy Management System for digital audio tape recorders. Under the proposed International Electrotechnical Commission standards for implementing SCMS, such subcode information would be supplied by default by the digital receiver and not the broadcaster.[28] These same standards would have been mandated under United States law by

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[28] Specifically to avoid such burdens, Section 3(e) of the Digital Audio Tape Recorder Act of 1990 intentionally was drafted to give broadcasters the option to transmit no subcode information whatsoever; but if the broadcaster chose to transmit any subcode information, only the subcode asserting (or not asserting) copyright protection for the work was required to be accurately transmitted.

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the Digital Audio Tape Recorder Act of 1990, and the Technical Reference Document incorporated therein by reference and published in 136 Cong. Rec. E376 (Feb. 26, 1990), which was considered in the 101st Congress by both the House and Senate as H.R. 4096 and S. 2358, respectively. These bills, which were not enacted into law, were drafted in consultation with RIAA and HRRC, and submitted to Congress with their mutual support.

However, these bills included an essential safeguard for consumers that would require the recording industry to encode phonorecords to work accurately in conjunction with the Serial Copy Management System.[29] If recording companies, instead, encode products furnished to broadcasters so as to "fool" DAT recorders, the RIAA's suggested mandatory broadcast of these subcodes could prevent all home taping from broadcasts. Without the complementary safeguard, the RIAA could make an end run around Congress and the courts, so as to allow record companies unilaterally to frustrate home tapers.

Subcode information that otherwise serves the interests of copyright holders and broadcasters could be adopted voluntarily. If a broadcaster believes that supplying information regarding artists, songwriters, tracking times, liner notes, etc., may be of

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[29] Section 3(d) of the Digital Audio Tape Recorder Act of 1990 provides in relevant part:

> ENCODING OF INFORMATION ON PHONORECORDS.--(1) No person shall encode a phonorecord of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material so as to improperly affect the operation of the serial copy management system.

benefit to the public, it voluntarily may do so or, if necessary, may contract with record companies to make such information available.[30] There is no need to mandate the inclusion of optional information, and thereby force broadcasters to incur additional burden and expense, or to sacrifice limited broadcast bandwidth, which may not be justified by commercial or policy considerations.[31]

CONCLUSION

For more than 20 years, consumers have been taping from analog broadcasts for their private listening enjoyment, with no evidence that such taping has hurt the music industry.

There is simply no reason to expect that home taping from broadcasts would increase in nature or amount because of digital audio broadcasting. Human factors of time and inconvenience, rather than sound quality, have always governed such matters.

If digital audio broadcasting and cable services are permitted to develop naturally according to marketplace considerations, the

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[30] As previously noted, International Cablecasting is making artist information available to consumers, via a remote unit, so as not to interrupt broadcasts with announcements. If one broadcaster already sees commercial advantages to disseminating such data, it seems obvious that market forces will continue to merit transmission of subcode information (perhaps even additional information such as lyrics, sheet music and album art) by voluntary agreement with the record and music industries.

[31] The Copyright Office asked a seventh question, requesting information relating to the business and commercial aspects of digital audio broadcast and transmission services. While much of the foregoing discussion relates to this last question, HRRC will not, in these initial Comments, separately address Question 7.

music, software and hardware industries, and consumers all will benefit from this progress. The surest way to stifle its potential, however, is to impose restrictions on these new technologies. Technological limitations on broadcasters (e.g., signal encryption or mandating broadcast of subcodes) or on home taping will kill this technology aborning, at the expense of the music, broadcast and consumer electronics industries and, ultimately, the public interest. Technological means of collecting royalty taxes (e.g., the still-theoretical debit card system) will be unduly expensive and burdensome for hardware interests and retailers; for consumers, they will be unacceptable and invasive of individual rights of privacy.

For these reasons, HRRC respectfully submits that there is neither legal nor factual justification for saddling the public and broadcasters with additional financial and technological burdens. Royalty taxes are inherently and irremediably unfair to consumers, and hardware and blank tape manufacturers. No further compensation is warranted for the thriving music and recording industries, which year after year post banner sales.

Respectfully, the present inquiry seems more about opportunities to tax than about the need to tax. If home copying is to be taxed, why not tax sales of computers and blank diskettes to compensate the software industry? Why not tax sales of photocopiers, blank paper and optical scanners to compensate the publishing industry? And if technological restrictions should be adopted to prevent home taping, why not impose similar restrictions

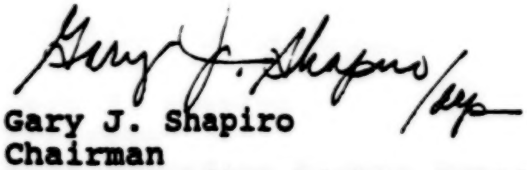
on all consumer copying technologies? Is this inquiry a prelude to some agency's decision to control access to future generations of VCRs?

In short, any conclusions suggested by the Copyright Office in principle potentially may apply to all reproduction technology for audio, video, computer software, visual arts and text, in both the digital and analog domains. Accordingly, we hasten to point out that there is no evidence whatever that any private home tapers -- audio, video, or otherwise -- should be charged or condemned, or that their access to new generations of audio and video technology and recorders should be made conditional. These are the very consumers that the music and movie industries depend on year after year for increasingly greater sales revenues. If digital technology should be singled out now, then the long playing record, FM stereo, the VCR and the dual-deck analog compact cassette recorder should have been banned or taxed immediately upon introduction.

If the Copyright Office follows the suggestions of the music and recording industries, then the only policy being implemented

is to impose royalties in the digital domain simply because it may be possible to collect them. Neither Constitutional precepts of copyright nor the public interest should be so easily sacrificed to expediency.

Respectfully submitted,



Gary J. Shapiro
Chairman
Home Recording Rights Coalition
c/o Electronic Industries
Association
Consumer Electronics Group
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202-457-4919

December 17, 1990

GENERAL COUNSEL
DEC 17 1990
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Comment Letter
RM 90-6
No. 6

Before the
COPYRIGHT OFFICE OF THE UNITED STATES
Library of Congress
Washington, D.C.

Digital Audio Broadcast and Cable Services; Copyright Office Study	)	Docket No. RM 90-6

COMMENTS OF THE
© COPYRIGHT COALITION

A. Introduction and Summary.

By a Notice of Inquiry published on October 24, 1990,[1] the Copyright Office of the United States ("Office") announced that, in response to a congressional request, it will examine the development of new digital audio services and the impact that implementation of such services may have on performers and copyright owners of works protected under the Copyright Act.[2]

These comments are submitted on behalf of the © Copyright Coalition ("© Coalition"), an organization formed by the American music community in October 1989 to address copyright issues raised by digital audio recording

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1/ Digital Audio Broadcast and Cable Services, Notice of Inquiry, 55 Fed. Reg. 42916 (1990).

2/ 17 U.S.C. §§ 101 et seq. (1988).

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technologies. The Coalition's membership includes The Songwriters Guild of America ("SGA"), the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), the National Music Publishers' Association, Inc. ("NMPA"), and more than 30 national and regional organizations[3/] that share the goal of promoting adequate and effective copyright protection for musical works.

The © Coalition represents the overwhelming majority of individuals and businesses engaged in the creation of musical works and the promotion of their use and enjoyment. As its name implies, the © Coalition addresses

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3/ In addition to SGA, ASCAP, BMI and NMPA, the © Copyright Coalition comprises the Arizona Songwriters; the Authors Guild; the Connecticut Songwriters Association; the Dramatists Guild; the Las Vegas Songwriters Association; the Los Angeles Songwriters Showcase; the Louisiana Songwriters Association; the Louisville Area Songwriters; the Midwest Songwriters Association; the Missouri Songwriters Association, Inc.; the Music Publishers Association (USA); the Nashville Songwriters Association International; the National Academy of Songwriters; the National Association of Composers/USA; the New England Musicians Association-Boston; the Northern California Songwriters Association; the Ohio Songwriters Association; the Pacific Northwest Songwriters; the Pennsylvania Association of Songwriters; the Pittsburgh Songwriters Association; the Rocky Mountain Music Association; the Santa Barbara Songwriters; SESAC; the Snowbelt Songwriters Guild; the Songwriters Association of Washington (D.C.); the Songwriters Hall of Fame; the Songwriters of Wisconsin; the Southwest Virginia Songwriters Association; the Southern Songwriters Guild; the Tennessee Songwriters Association; the Texas Songwriters Association; the Triad Songwriters Association (North Carolina); and the United Songwriters Association (Kansas City, Kansas).

the special concerns of American songwriters and music publishers, whose proprietary interest in a protected musical work embodied in a recording is symbolized by the "©".[4/]

Songwriters and music publishers derive their livelihoods solely from the exercise of the exclusive rights in intellectual creations, as granted by the Copyright Act. Accordingly, the © Coalition and its constituent organizations have a direct and substantial interest in resolving the tensions between new technologies and the copyright law.

Digital audio services, as the Office observed, are capable of providing "interference-free, compact-disc quality" music via terrestrial-based and satellite transmission systems or via cable.[5/] Digital audio broadcast and cable services will make it possible for a river of CD-quality music to reach every home. The combination of digital audio receiving and recording devices will enable tapers to record digital signals and make virtually flawless digital "clones" of protected music to add to their permanent music libraries. These linked digital transmission and recording technologies can be

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[4/] The separate copyright in a sound recording, or a particular recorded rendition of a song, is typically owned by a record company, and is symbolized by the "℗". See 17 U.S.C. § 102, § 402.

[5/] 55 Fed. Reg. at 42917.

expected to exacerbate the already serious levels of home taping that plague the music community. Ultimately, copying from digital audio services may become a primary source for obtaining recordings of musical works, eclipsing sales of prerecorded CDs, cassettes and records and jeopardizing a primary source of songwriter and publisher income.

The Constitution gives Congress the authority to "promote the Progress of Science and the useful arts" by securing to authors, for limited times, the exclusive right to their creative works.[6/] From the first copyright law -- enacted in 1790 -- through the current Copyright Act, Congress has exercised its constitutional power by establishing and refining a system of economic rights of authors. The Copyright Act attempts to balance private and public benefit by conferring rights "designed to assure contributors to the store of knowledge a fair return for their labors,"[7/] while at the same time assuring the public of "access to the products of [creator's] genius after the limited period of control has expired."[8/]

This balance is being shifted by technology. Unless Congress acts promptly, music creators and copyright

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6/ U.S. Const. art. I, § 8, cl. 8.

7/ Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546 (1984) (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

8/ Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, at 429 (1984).

owners could be left with no meaningful way in which to exercise the right to control the reproduction of their works. Substantial decreases in industry revenues could signal the creation of fewer new works for the public benefit. The public's interest in access to creative works and the creator's legitimate right to the financial rewards of his efforts, however, can both be preserved through the establishment of a system of remuneration in respect of home audio taping.

A royalty payment system would neither unduly encumber consumer taping activity, nor interfere with the introduction of new audio recording technologies. Royalty systems have been implemented by other nations, and have proven fair to creators and rights owners, as well as to consumers and the manufacturers of recording devices. Moreover, established collecting societies in the United States and throughout the copyright-respecting world are positioned to implement such a system efficiently and with little administrative burden.

Merely requiring digital audio service providers to transmit the digital subcode information that triggers the operation of the so-called Serial Copy Management System ("SCMS") will not ensure adequate protection of music copyrights. SCMS, if implemented according to the plan supported by the consumer electronics industry, would not

prevent taping from digital broadcast or cable music services.

Without appropriate royalty provisions, the link between digital transmission and recording technologies will have a profound -- and devastating -- impact on the music community. The ° Coalition urges the Office to recommend that the 102nd Congress move to consider legislation to establish a home audio taping royalty payment system.

B. Digital Audio Transmission Services and Home Taping.

The livelihoods and businesses of American songwriters and their music publishers depend upon revenues generated from licenses authorizing uses of music protected by copyright. The exclusive rights granted by the Copyright Act are the rights to authorize the reproduction, adaptation, public distribution, public performance and public display of protected works.[2/] Public performance royalties and "mechanical" royalties from licenses authorizing the manufacture and distribution of what the Copyright Act calls "phonorecords" -- vinyl albums, prerecorded cassettes and CDs -- represent the principal sources of songwriter and music publisher income.

At the end of the Second World War, works protected by copyright reached American homes primarily through three channels -- as printed material, over radio and in phonograph records. The entities that made the works

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2/ 17 U.S.C. § 106.

available to the public were licensed by the copyright owner and paid royalties based on levels of dissemination. Although members of the public could enjoy these works freely, they could not copy them conveniently or at low cost.[10/]

In recent decades, rapid advances in the fields of information and communications technologies have made it possible to access works through a variety of new media; at the same time, developments in consumer electronics have facilitated a transfer of the ability to reproduce works from the commercial entrepreneur to the individual end user.[11/] As a result, so-called "personal" or "private" use involving reproduction rights is becoming widespread, and in some fields is already having a significant and detrimental impact on markets for protected works.[12/]

10/ See U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302 (Washington, D.C.: U.S. Government Printing Office, April 1986) at 6-7.

11/ Id. at 193.

12/ The Copyright Act does not provide, and no court has ever held as a general principle, that "private" or "personal" copying is not an infringing activity. Representatives of the consumer electronics industry frequently cite the Supreme Court's opinion in Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), as recognizing home taping as "fair use" under the copyright law, but this characterization of the Court's holding is incorrect. A five-Justice majority of the Supreme Court held only that video "time-shifting" -- the practice of making a video tape of a program broadcast free of charge to the general public for the purpose of viewing the tape at a (continued...)

Nowhere is this trend more evident than with regard to the unauthorized reproduction of musical works through the practice of home audio taping.

1. The nature of the problem.

The threat posed by the combined availability of digital audio transmission and recording devices derives from the "cloning" capability of digital technology. Tapes made on traditional analog recording devices pick up static and distortions along with the music.[12/] Consequently, homemade analog tapes, and particularly copies of CDs, are inferior in sound quality to the prerecorded original. Sound quality further degrades from one "generation" of copies to the next. Not so with digital audio recorders.

The digital audio tape ("DAT") recorder and other digital audio recording devices on the horizon[13/] will give

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[12/](...continued)
later time and then erasing it -- was fair use where some copyright owners had authorized the practice and no economic harm was demonstrated by the copyright owners who brought suit. The Court did not consider home audio taping at all; in fact, it did not even address issues raised by video taping from cable or pay television, or by the sharing of tapes. Id. at 425. Even upon the facts before the Court, four dissenting Justices would have held video time-shifting practices to be infringing.

[13/] Analog technology involves transcribing on to magnetic tape physical or electrical marks in a continuous range of frequencies analogous to sound.

[14/] According to press reports, Philips is preparing to introduce the digital compact cassette ("DCC") recorder, a device with a digital cloning capability and the ability to play back both DCC and traditional
(continued...)

tapers -- for the first time ever -- the ability to make virtually perfect copies of prerecorded music protected by copyright.[12/] DAT machines and other digital audio recorders copy and play music that has been encoded digitally; they convert sound into a series of electronic pulses symbolized by zeros and ones, in the same way information is stored in a computer. The use of digital codes means that the music is transferred without noise and static. The result is a virtually perfect copy with the brilliant sound quality of the digital original.

[11/](...continued)
analog cassettes. In addition, Sony, Philips, Thomson and other manufacturers are perfecting erasable, recordable CD technologies.

[12/] The issue of unauthorized digital audio taping is currently before the courts. On July 9, 1990, certain copyright owners and music publishers, on their own behalf and on behalf of others similarly situated, filed a class action law suit in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against Sony Corporation, Sony U.S.A., Inc. and Sony Corporation of America (collectively "Sony"). That action, Sammy Cahn, et al. v. Sony Corporation, et al., 90 Civ. 4537, is pending before the Honorable Robert W. Sweet. Plaintiffs seek a declaration that i) unauthorized home audio taping on DAT recorders of copyrighted musical compositions is unlawful under the Copyright Act; and ii) that Sony will be contributorily liable for infringing the copyrights of members of the plaintiff class through the manufacture, importation and distribution of DAT recorders and/or blank DAT cassettes for sale to consumers in the United States. Plaintiffs also seek injunctive relief barring Sony, its agents, employees and all other persons acting under, in concert with or for Sony, from manufacturing, importing or distributing for sale to consumers in the United States DAT recorders and blank DAT cassettes.

Until now, the only sources of digitally recorded music have been prerecorded CDs and an extremely limited number of prerecorded DATs. But digital audio broadcast and cable services will provide an abundant alternative source of protected music for direct digital-to-digital cloning at home, and can be expected to exacerbate already serious levels of unauthorized audio taping.

In comments submitted for the record of a Federal Communications Commission ("FCC") proceeding on the establishment and regulation of new digital audio radio services, the Recording Industry Association of America ("RIAA") warned that

> [t]hrough the combination of [digital] recording and receiving devices, digital audio services have the potential to become the "electronic record stores" of the future. Moreover, subscription digital audio services may enable home listeners in the future to "call up" . . . particular selections at will, thus becoming a "celestial jukebox", perhaps displacing record sales altogether.[15/]

New digital audio technologies will enable end users -- consumers -- to generate their own master-quality, competing "product" at fraction of the cost of prerecorded originals and without compensation to the creators and copyright owners. In this environment, the argument that

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15/ Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Federal Communications Commission, GEN Docket No. 90-357, FCC 90-28, (1990) (comments of the Recording Industry Association of America, at 5-6).

such "personal" use is "noncommercial" and of no harm to the market for protected works is wholly unpersuasive.

2. Predicting the extent of harm.

In its Notice of Inquiry, the Office stated its concern "that the rights and interests of those who own copyrights in works that may easily be transmitted and then copied in digital form should be balanced with the public's interest in enhanced technology and improved sound quality." It went on to acknowledge that "these concerns bring to light often-aired debates about home taping, the introduction of digital audio taping equipment into the United States' consumer market, and the possible introduction of royalty payment systems."[17/]

To assist it in the preparation of its report to Congress, the Office specifically invited comment or information regarding the likely incidence of home audio taping from digital audio broadcast services and whether such taping can be expected to displace sales of prerecorded CDs, cassettes or albums.

No method exists by which to gauge precisely the amount of home copying that will occur from CD-quality digital transmissions. A recent consumer survey, however, evidences the pervasiveness of current home taping practices using analog recording devices, and points to the enormity

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17/ 55 Fed. Reg. 42917.

of the potential problem and of the resultant loss to copyright owners and music creators.

In a June 1990 report submitted to the Senate Commerce, Science and Transportation Committee's Subcommittee on Communications,[18/] The Roper Organization examined consumer taping behavior with analog recording devices and probing likely taping activity with DAT ("Roper Survey"). The Roper Survey was the first, and to the Coalition's knowledge remains the only, consumer survey to explore digital audio taping behavior. (A copy of the Roper Survey report is Exhibit A.)

With regard to current home audio taping practices, the Roper Survey found that:

- Thirty-seven percent of the general population sample (aged 14 and over) acknowledged that they taped prerecorded music -- from records, compact discs, cassette tapes or AM and FM radio -- during the twelve month period ending April 1990. (Roper Survey at 2.)

- Fifty-seven percent of prerecorded music tapers made copies to give away or exchange with others, in addition to making copies for their own use. (Roper Survey at 5.)

- On average, 81 percent of the tapes made were "librariedd", that is kept as part of the taper's permanent music collection. Six in ten tapers reported keeping all of the tapers they make. (Roper Survey at 6.)

- The average number of tapes of complete albums or CDs made by each prerecorded music taper in the

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18/ See Digital Audio Tape Recorder Act of 1990: Hearings on S. 2358 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess. (1990).

past year was 11.5. The average number of tapes made of selections or singles was 11.0. (Roper Survey at 8.)

- Two-thirds of tapers said that if they had been unable to make their tapes, they would have purchased at least some of the recordings they taped. On average, about seven recordings per music taper would have been bought. This projects to approximately 322,500,000 displaced sales (unspecified as to albums or singles). (Id.)

This evidence is supported by other sources. A 1989 report issued by the U.S. Congress's Office of Technology Assessment ("OTA") concluded that one billion pieces of music are copied each year in the United States alone.[19/] And the RIAA independently projects that home taping with analog recording devices currently displaces about one third of industry sales, resulting in the loss of approximately $1 billion per year.[20/]

OTA's findings further demonstrated that individuals now tape prerecorded music not only from albums, cassettes and CDs, but also -- and extensively -- from AM and FM radio broadcasts: it concluded that approximately 439 million of the music tapings which occurred during its

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19/ U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, D.C.: U.S. Government Printing Office, October 1989) at 154.

20/ Amendment of the Commission's Rules with regard to the Establishment and Regulation of New Digital Audio Radio Services, Federal Communications Commission, GEN Docket No. 90-357, FCC 90-281 (1990) (comments of the Recording Industry Association of America, at 5, n. 6).

survey period were made either from radio or television broadcast sources.[21/]

Because digital copying virtually eliminates any qualitative distinction between an authorized and unauthorized copies, the level of home taping and the resultant loss to rights owners and music creators can only be expected to increase with the widespread availability of DAT and other digital recorders. And the Roper Survey bore this out.

Specifically, the Roper Survey data showed that <u>everyone who expressed an interest in owning and taping with a DAT recorder would use it to tape prerecorded music.</u> Only one individual in the relevant sample indicated that the device would be used exclusively for noninfringing recording. (Roper Survey at 12.) This contrasts sharply with data on current taping practices. One-fifth of analog tapers report using their recording equipment only for non-infringing purposes. (<u>Id</u>.)

Moreover, one-third of current music tapers said that they would tape more prerecorded music if they had a DAT recorder available, and more than half (52 percent) of those who do not now tape, but who expressed an interest in owning a DAT recorder, said that they would use DAT to copy prerecorded music. (Roper Survey at 14.)

21/ OTA Home Copying Report, at 154.

Most significantly, the Roper Survey confirmed songwriters' and music publishers' fears that the availability of digital audio recording technologies will lead to the widespread digital cloning of their works. The numbers of individuals who say that they would tape CDs -- either their own or someone else's -- increase dramatically when asked about projected behavior with DAT. Sixty-four percent of current prerecorded music tapers who expressed an interest in owning a DAT recorder and using it to copy prerecorded music said that they would make copies of their CDs. Thirty-seven percent copy their CDs now. An even larger percentage -- 67 percent -- of the same group said that if they owned a DAT recorder, they would tape CDs they borrowed from others. Only thirty percent now copy borrowed CDs. (Roper Survey at 13.)

The increased interest in copying CDs evidences tapers' awareness that digital technologies will enable them to produce a better "product" than they can with analog recording devices. In fact, more than half of those surveyed who had heard an analog tape recorded from a CD stated that they believed the copy to be of inferior sound quality -- something remedied in recording on DAT from a digital source, whether the source is a CD or a digital broadcast or cable service.

The Roper Survey further found that although 66 percent of current home tapers copy music from AM and FM

radio broadcasts, 49 percent thought that they would tape from AM or FM radio with DAT. Viewed together with survey responses demonstrating increased interest in taping CDs with DAT, the data serve as another indicator both of consumers' awareness of the superiority of direct digital-to-digital copies and of the role copy quality plays in motivating taping behavior.[22/]

Through the so-called Home Recording Rights Coalition ("HRRC"), the foreign-dominated consumer electronics industry has for a decade asserted that the practice of home audio taping does not harm the American music industry. The HRRC's constant refrain has been that the music industry does not lose revenues to home taping because tapers tend to copy records or CDs they already own, and because, the HRRC further alleges, taping in some instances stimulates purchases of phonorecords.

Digital audio services stand to render these already unpersuasive arguments moot. In the very near future, CD-quality music will be delivered to many homes by cable; digital audio broadcast will be established within years. It is entirely possible that soon homemade copies from digital audio broadcast and cable services will not only displace sales, <u>they will replace sales of music in CDs and other prerecorded formats.</u>

22/ The Roper Survey did not directly question consumers concerning projected copying behavior involving digital audio broadcast or cable services.

Without congressional intervention, the market for and revenues from the sale of phonorecords could go the way of sheet music, demand for which has been decimated by the photocopier.[22/] In fairness to consumers and to music creators and copyright owners, Congress must step in to clarify rights and obligations in the face of digital technologies for transmitting and recording musical works.

C. The Solution -- A System of Equitable Remuneration.

Other countries throughout the copyright-respecting world have already found a fair and balanced solution to the technology-driven problem of home audio taping. Thirteen nations have responded by establishing a system of royalties on home taping devices.

Home taping royalty payments to music creators and rights owners are not "taxes" as the consumer electronics industry, through the HRRC, disingeniously claims. Rather, they represent compensation to the creators and owners of intellectual property for uses made of their works. In advocating a home audio taping royalty, songwriters and music publishers seek no more than to maintain the right to compensation for the use of their works, in the same way

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22/ See Digital Audio Tape Recorder Act of 1990: Hearings on S. 2358 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess. 228 (1990) (statement of George David Weiss, president, The Songwriters Guild of America).

that the inventors of audio recording technologies expected to be -- and are -- compensated for their inventions.

Under existing private copying systems, royalties typically are shared among songwriters, performers, and music and sound recording rights owners. Often, a portion of the total amount collected is allocated to a cultural fund that is used to promote the arts and stimulate the creation of new works.

Seven countries (Argentina, Australia, Austria, Finland, France, Hungary and Turkey) base royalty collections on the sale of blank recording tape. Six others (Germany, Iceland, Portugal, Spain, Norway and Zaire) have laws that base collections on both blank tape and recording hardware sales. (A detailed report on the bases for collection and the distribution of national home audio taping royalties, issued in January 1990 by the European Mechanical Rights Bureau ("BIEM"), is Exhibit B.)

Industry sources in Europe predict that the Netherlands will soon enact a royalty on audio tapes (expressly including unrecorded DAT tapes, erasable CDs and write-once CDs). The Commission of the European Communities ("EC") has announced its support for a royalty system of compensation in respect home audio taping, and is developing a proposal to be submitted to the Council of Ministers.[24/]

[24/] Clark-Meads and Hennessey, EC Ministers Hear Copyright Concerns, Billboard, Dec. 1, 1990, at 5.

In the context of the U.S. Copyright Act, it is possible that a compulsory license might be established authorizing the practice of home audio taping in exchange for a modest royalty on recorders and/or blank tapes. The rate could be set by the Congress, or by the Copyright Royalty Tribunal ("CRT") pursuant to legislative criteria designed to ensure fairness to songwriters, performers, musicians, copyright owners, tapers and the manufacturers and distributors of taping devices.

Administrative burdens associated with such a system could be minimized. As is the case in most countries where home taping royalties are already in place, the operations of existing collecting societies could be adapted to handle collection and distribution of this form of royalty income. Existing arrangements could also facilitate the payment of royalties to foreign societies, as well as the distribution to U.S. songwriters and music publishers of home taping royalties collected abroad.

U.S. songwriters and publishers currently share in most nations' home taping royalty distributions, to the extent their works are copied. There is growing concern, however, that the longer the U.S. waits to establish a home audio taping royalty system, the more likely it is that other countries will exclude U.S. creators and rights owners from their distributions. Australia and Finland have already decided that only rights owners from countries that

also have audio taping royalty systems will be able to share in their copying royalties. U.S. songwriters and publishers, whose music is among the most popular and the most frequently taped, will receive no benefit under these laws. Moreover, royalties that would otherwise go to American songwriters will be shared among foreign writers who qualify by virtue of their national laws.

A home taping royalty system would maintain the copyright law's balance between the interests of creators and those of the public. While preserving the economic incentive that spurs the creation of new works, a home audio taping royalty would give individuals the legitimate option of obtaining copies of protected works by taping rather than through purchase. It would promote the public's access to works and impose no technical barrier to the practice of taping (as through the need to obtain a special "debit card" to activate the "record" function of a taping device). And it would ensure that American songwriters and publishers receive their fair share of other nations' audio copying royalty distributions.

Consumers want digital-quality music and they want to tape. With new and abundant sources of digitally transmitted music and digital devices for copying, the home taping "alternative" can be expected to overwhelm the market for prerecorded formats. It is not only reasonable but imperative that the creators and owners of rights in the

works copied receive equitable remuneration for this new and competing use of their works.

D. SCMS Will Not Curb Copying from Digital Audio Services.

In the 101st Congress, the consumer electronics industry actively supported legislation to require all consumer-use DAT recorders imported or sold in the United States to include Serial Copy Management System ("SCMS") technology (S. 2358/H.R. 4096). The © Coalition strongly opposed these SCMS-only measures. Songwriters and music publishers continue to believe that SCMS cannot be "the" solution to home taping from any source; a comprehensive solution including royalties is warranted.

Even if digital audio services were required to transmit digital subcode information relating to SCMS (which identifies the copyright and "generation" status of the source), and even if all consumer-use digital audio recorders were to implement the system, the limits on unauthorized taping from such services would be inadequate and largely ineffective.

Transmission of the encoded information prescribed by S. 2358/H.R. 4096 would not inhibit taping from a digital audio service.[25/] The digital broadcast of an entire CD or

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25/ Section 3(d) of S. 2358/H.R. 4096 (the "Digital Audio Tape Recorder Act of 1990") provided in relevant part:

> ENCODING OF INFORMATION ON PHONORECORDS.-- (1) No person shall encode a phonorecord of a sound recording with inaccurate information relating to (continued...)

of desired selections could be copied onto DAT; only the making of additional, direct digital copies from a homemade DAT tape would be blocked. This does not mean, however, that the DAT tape could not be copied on an analog cassette recorder, or through the analog input of a DAT recorder. "Second generation" copies made through an analog link would not be perfect digital clones, but would be of very high quality and fidelity.

And, of course, SCMS -- like any technical measure to prevent copying -- can be defeated. At congressional hearings on S. 2358, two witnesses testified that the SCMS

[25/](...continued)

> the category code, copyright status or generation status of the source material so as to improperly affect the operation of the serial copy management system.
>
> The provision was designed to prevent record companies from blocking all copying from a prerecorded CD or DAT by encoding such phonorecords to themselves trigger the copy-prohibit function of a DAT recorder. This can be done simply by coding the CD or DAT with information identifying it as a digital copy rather than as a digital original (from which one generation of copies can be made).
>
> The limited number of consumer-use DAT recorders that have been imported into the United States thus far for distribution through authorized channels appear to be equipped with SCMS. The fact remains, however, that Congress declined to enact the electronics industry's SCMS bill. Consequently, there is no legal bar to a record company's decision to furnish broadcasters and cable operators with phonorecords encoded to prevent all DAT home taping from such sources, in much the same why the motion picture industry has used the "Macrovision" system to prevent copying.

system can be readily circumvented, merely with the skill of an electronics hobbyist and at minimal cost.

Because the nature of digital technology imposes no limits on the number of perfect copies -- or the number of generations of perfect copies -- that can be made from a digital source, the ° Coalition does not oppose the establishment of SCMS as part of framework for ensuring adequate and effective copyright protection in the digital age. But that framework must include fair compensation for rights owners and creators. SCMS alone is wholly inadequate.[28/]

E. Negotiated Agreements.

As the Office observed in its Notice of Inquiry, developments in digital audio transmission are following two paths. Three companies in the United States are preparing to deliver commercial-free CD-quality audio service over cable television for a separate fee to the consumer, much as is done with pay TV. ASCAP and BMI have negotiated, or are in the process of negotiating, public performance license

---

28/ The ° Coalition's position in support of a home taping royalty system backed SCMS is shared by international songwriter, music publisher and recording industry groups, including the International Federation of Phonogram and Videogram Producers ("IFPI"); the European Mechanical Rights Bureau ("BIEM"); the International Federation of Musicians ("FIM"); the International Federation of Actors ("FIA"); the International Federation of Popular Music Publishers ("IFPMP"); the Canadian Independent Record Producers Association; and the Japanese Federation of Music Organizations.

agreements with these companies. The agreements reached to date are based on a percentage of revenue, and encompass the revenue of, and the public performance of works on, both the program suppliers and the local cable television operators.

Similarly, it is expected that, following appropriate FCC action, the performance rights societies will attempt to negotiate licensing agreements with digital audio broadcasters.

These public performance licenses are welcomed by the music industry. However, the performance license fees paid by the program suppliers are not intended to and will not compensate rights owners and creators for the taping and lost mechanical royalties that are sure to follow.

F. Conclusion.

The advent of digital audio services, in conjunction with the availability of recording equipment allowing the "cloning" of prerecorded music, thrusts the music community into a future in which digital transmission directly into the home may be the principal avenue of commercial exploitation.

Without legislative action to assure compensation for home copying, the right to control the reproduction of works, granted by the Copyright Act, is rendered little more than a hollow promise. Jeopardizing this vital interest and important source of revenue could have dire consequences for the music community.

The • Coalition urges the Copyright Office to recommend to Congress the immediate consideration of legislation establishing a compulsory license authorizing home taping for personal use in exchange for a royalty payment to compensate songwriters, performers and copyright owners.

Respectfully submitted,

• Copyright Coalition
205 East 42nd Street
New York, NY 10017
(212) 370-5330

George David Weiss
President, SGA

Morton Gould
President, ASCAP

Frances W. Preston
President, BMI

Edward P. Murphy
President, NMPA

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Exhibit A

Report on
Home Audio Taping
and Projected DAT Use

June 1990

The Roper Organization Inc.

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Introduction

This survey, conducted by The Roper Organization, reports information on what may be described broadly as two basic subjects:

(1) the current amount of home audio taping of pre-recorded music that takes place in the U.S.

(2) the amount of such taping using DAT (digital audio tape) recorders that is planned or projected in the near future by people who express an interest in owning and using such equipment.

The survey is based on 1504 telephone interviews with a representative national sample of persons age 14 and older living in the continental United States. The sample is based on a random digit dialing procedure that insures the inclusion of households with both listed and unlisted telephones. Interviewing was conducted between April 17 and May 2, 1990.

Summary of Major Findings

The survey confirms a very substantial amount of home taping, clearly resulting in lost sales. Some 37% of all Americans age 14 and over currently tape pre-recorded music, including about half of those between the ages of 14 to 49. Also, among those who use audio equipment to tape from any source, about 8 in 10 tape pre-recorded music. On an annual basis, some one billion tapes of pre-recorded music are being copied.

Perhaps the most striking finding is that 100% of those interested in using DAT equipment for taping will use it to tape pre-recorded music. On the premise that taping pre-recorded music infringes the copyrights, this means that DAT recorders will be employed by just about every purchaser for copyright infringement. Survey participants predict they will copy more pre-recorded music with DAT recorders than they now copy, and an increased number of people will be copying pre-recorded music. DAT will mean more infringement, by more people.

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Prevalence of Pre-recorded Music Taping

Thirty-seven percent of the public have made tapes of music from a pre-recorded source -- records, compact discs, cassette tapes or radio -- in the past year. Among younger people, those 14-17 years of age, 77% are tapers of pre-recorded music, as are about half of all persons age 14-49.

The 1988 OTA survey found that 41% of the public were "past-year music tapers." The OTA survey is not completely comparable to the current survey, as the former included persons age 10-13. However, where comparisons of tapers can be made, the two surveys show a similar prevalence of taping.

Pre-recorded Music Tapers

	%	Base
Total	37	(1504)
Sex		
Male	38	(676)
Female	36	(828)
Age		
14-17	77	(156)
18 - 29	52	(377)
30 - 49	39	(548)
50 - 64	20	(231)
65+	9	(148)

(Q.: "Using either your own or someone else's equipment, have you personally made any tapes of music from any pre-recorded source--records, compact discs, cassette tapes, radio--in the past 12 months?")

Such a high prevalence of taping is not surprising given that almost all households own audio equipment; only 2% own no such equipment. Further, nearly three-fourths own at least one piece of equipment that can be used to record onto blank tapes. Half (50%) of those who own recording equipment are tapers of pre-recorded music.

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Infringing Versus Non-Infringing Taping

What is identified in this report as infringing behavior (i.e., the taping of pre-recorded music) is considerably higher than what is identified as non-infringing behavior (i.e., the taping of such things as lectures, dictation, and family or friends performing).

Among all those who are tapers, about 8 in 10 do at least some infringing taping -- about half of all tapers tape solely pre-recorded music, while only a fifth tape solely from non-infringing sources.

Infringing Versus Non-Infringing Uses

	Total	*Tapers**
Base:	(1504)	(757)
	%	%
Infringing[1]	37	79
Infringing only	22	48
Both infringing and non-infringing	15	31
Non-Infringing[2]	25	52
Non-infringing only	10	21
Both infringing and non-infringing	15	31
Non-tapers	53	-

* Those who tape from any source, not just pre-recorded music.

[1] *(Q.: "Using either your own or someone else's equipment, have you personally made any tapes of music from any pre-recorded source--records, compact discs, cassette tapes, radio--in the past 12 months?")*

[2] *(Qs.: "Using either your own or someone else's equipment, have you personally made any audio tapes of lectures, dictation, or anything else other than music in the past 12 months?" and "Using either your own or someone else's equipment, have you personally made any audio tapes of you, a family member, or a friend performing music?")*

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Sources of Music Taped

Pre-recorded music tapers copy from a wide variety of sources -- from records, cassettes, compact discs, and previously recorded tapes. Sources of copying are both owned and borrowed. While more taping is done from the former, borrowed sources play a significant role.

Further, it should be noted that almost half of pre-recorded music tapers copy from tapes that they had previously made from a pre-recorded source, and over four in ten copy from such a previously recorded tape that is borrowed. Thus, it is obvious that multiple copies of pre-recorded music are being made.

Sources of Music Taped in Past Year

	Pre-recorded Music Tapers
Base:	(606)
	%
A record I own	56
A radio program	55
A purchased pre-recorded cassette tape I own	52
A tape I had previously made from any pre-recorded music source	49
A tape someone else had made from any pre-recorded music source	44
A purchased pre-recorded cassette tape I borrowed	43
A record I borrowed	33
A compact disc I own	29
A compact disc I borrowed	23

(Q.: "I'd like to know what kinds of things you recorded the music from. As I read each possible source, please tell me if you taped music from it in the past 12 months. Did you tape music from...?")

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Exchanging Tapes

Taping is not done just for personal use. While many more tapes are made for personal use than to give to someone else, a majority of pre-recorded music tapers (57%) are involved with exchanging tapes among family, friends, classmates, or through some kind of club.

As might be expected from their higher level of taping, younger pre-recorded music tapers are more likely to participate in the exchange of tapes.

Exchange Tapes Made From Pre-recorded Music with Others

	Pre-recorded Music Tapers	
	%	Base
Total	57	(606)
Age		
14-17	77	(119)
18 - 29	65	(198)
30 - 49	48	(219)
50 - 64	31	(48)
65+	47	(13)

(Q.: "From time to time, do you exchange tapes that have been made from pre-recorded music with family, with friends, with classmates, or through some kind of club?")

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Permanent Versus Temporary Use of Tapes

Pre-recorded music tapers tend to keep the tapes they make as part of their permanent collection, as opposed to taping over them at some point. Only 5% keep none for their permanent collections, while 6 in 10 say they plan to keep all tapes that are made.

On average, 81% of the tapes made are retained.

Retention of Tapes Made from Pre-recorded Music Sources

	Pre-recorded Music Tapers
Base:	(586)
	%
Percent of tapes retained:	
0	5
1-9	3
10-49	7
50-69	8
70-79	5
80-89	3
90-99	6
100	61

(Q.: "Once you make a tape, you can either keep it as part of your tape collection or you can erase and tape over it at some time. Of the (number from above) tapes you made from any pre-recorded music source in the past 12 months, about what percentage do you plan to keep in your tape collection?")

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Types of Music Taped

No creator is immune from the unauthorized copying of his/her work. All types of music are subject to at least some home taping, with contemporary pop or rock music, classic rock, and easy listening leading the list.

Types of Music Taped in Past Year

	Pre-recorded Music Tapers
Base:	(606)
	%
Contemporary pop or rock music	73
Classic rock from the 60s and 70s	56
Easy listening music	47
Soul, rhythm & blues	39
Country music	34
Jazz and new age music	33
Rap	32
Hard rock; heavy metal	31
Classical music; operas; symphonies	30
Dance and disco music	30
Show music from Broadway, movie or TV sound tracks	28
Gospel and sacred music	22
Reggae music	22
Big bands and pop music from the 40s and 50s	20
Latin music	10
Any other type of music	10

(Q.: "Now I'd like to know the types of music you tape. As I read each type, please tell me if you taped it in the past 12 months. Did you tape....?")

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Number of Tapes Made

The average number of tapes of complete albums or compact discs made by pre-recorded music tapers in the last year is 11.5. The average number of tapes of selections or singles made by pre-recorded music tapers in the last year is 11.0.

Projecting these numbers to the total population, the number of infringing tapes of complete albums or compact discs made in the past year is approximately 485,745,910. The number of infringing tapes of selections or singles made in the past year is approximately 596,341,982. Thus, the total number infringing of tapes made in the past year projects to approximately 1,082,087,892.

Purchase Displacement

About a third of pre-recorded music tapers (34%) say that if they had been unable to make their tapes, they would not have bought the recordings that they taped.

Thus, two-thirds say they would have made some additional purchases of the recordings that they taped -- on average, about seven recordings per pre-recorded music taper would have been bought. This projects to approximately 322,500,000 recordings (unspecified as to albums or singles).

Another indication that home taping displaces purchasing is that 54% of the total public (age 14 and over) say they listen to tapes that have been made (either by themselves or someone else) about the same amount (36%) or more (18%) as they listen to purchased tapes.

Thus, it is clear that home-recorded tapes compete heavily with purchased tapes as a source of music listened to.

Awareness of Digital Audio Tape Recorders

One-fourth of the public reports having heard or read about digital audio tape recorders during the past year or so. This is a substantial level of awareness for a product that has not yet been officially introduced and apparently is only available in this country on the gray market. Unquestionably awareness will grow as the product is introduced and becomes available at a reasonable price.

The awareness level of digital audio tape recorders is higher among pre-recorded music tapers, with 34% having heard or read about them recently.

Interest in DAT Recorders

After being given a description of the digital audio tape recorder*, over 4 people in 10, putting aside cost considerations, express some degree of interest in owning the equipment . The level of interest reaches nearly two-thirds (64%) among pre-recorded music tapers.

Likelihood to purchase a DAT recorder, of course, will depend on the price. A third of those who express an interest in the DAT recorder claim some purchase likelihood at a price range of $750-$1000. When the price is reduced to the $300-$500 level, an additional 41% claim some purchase likelihood. Thus, three-fourths of those with some interest in a DAT recorder express some degree of purchase likelihood at the lower price level.

Interest in Owning a DAT Recorder

	%	Base
Total	43	(1504)
Age		
14-17	78	(156)
18 - 29	63	(377)
30 - 49	44	(548)
50 - 64	29	(231)
65+	13	(148)
Pre-recorded music tapers	64	(606)

* "Digital audio tape recorders record sound in a completely different manner from other tape recorders. Because of this technological breakthrough, the equipment has ultra high fidelity. For example, recordings made from compact discs with digital audio tape recorders are just about the same in sound quality as the compact discs themselves. You can record from a record, a cassette, a compact disc, or off the air on to a digital tape, and the copy will be just about the same as the original. You also can play pre-recorded digital tapes."

(Q.: "Putting aside cost considerations, how interested do you think you might be in owning a digital audio tape recorder? Would you be very interested, somewhat interested, slightly interested, or not at all interested?")

Projected DAT Taping

Asked to assume that the initial price for DAT recorder tapes would be about double that of the better quality regular tapes now on the market, over half (52%) of those who express an interest in the DAT recorder say they would make tapes with the equipment if it were available to them.

Those interested in owning and taping with a DAT recorder would tape from a variety of music sources, as do current pre-recorded music tapers.

Sources for Projected DAT Taping

	Interested in Owning DAT and Using it To Make Tapes
Base:	**(371)**
	%
A record I own	78
A purchased pre-recorded cassette tape I borrowed	76
A record I borrowed	75
A purchased pre-recorded cassette tape I own	73
A compact disc I borrowed	70
A tape I had previously made from any pre-recorded music source	61
A tape someone else had made from any pre-recorded music source	60
A compact disc I own	65
Me, a family member or a friend performing music	52
A radio program	48
Lectures, dictation, or anything else other than music	34

(Q.: "I'm going to read you a number of things that you might record with the DAT recorder. As I read each one, please tell me if you think it is something that you, personally, would tape with a DAT recorder. Would you tape...?")

Infringing Versus Non-Infringing Uses of DAT

All who express an interest in owning and taping with a DAT recorder say they would put it to an infringing use. Virtually no one (only one in 371) would make use of it only for non-infringing purposes.

This contrasts with the current situation where, among those persons who tape from any source, a fifth use their recording equipment only for non-infringing purposes.

Infringing Versus Non-Infringing Uses of DAT

	Interested in Owning DAT and Using it To Make Tapes
Base:	**(371)**
	%
Infringing uses only (To make tapes of pre-recorded music)	40
Non-infringing only (To make tapes of lectures, dictation, family members performing, music, etc.)	0
Both	60

(Q.: "I'm going to read you a number of things that you might record with the DAT recorder. As I read each one, please tell me if you think it is something that you, personally, would tape with a DAT recorder. Would you tape... [see list on page 11]*?")*

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Use of DAT Recorders

Another way to estimate future use of DAT recorders is to look at current tapers of pre-recorded music who also express an interest in owning and using DAT recorders.

The data indicate that this group would do more taping with DAT recorders than it does with its current equipment.

Especially striking is the fact that the numbers who say they would tape compact discs -- either their own or someone else's -- go up dramatically when asked about projected taping behavior with DAT. (Underlying this, at least in part, is the fact that over half of those who have heard a tape recorded from a compact disc believe there is a loss of quality -- something that will be remedied with the DAT recorder.) Also, note the sharp increase in projected taping from borrowed sources.

Current Taping Behavior Compared to Projected Use of DAT

	Pre-Recorded Music Tapers Who are Interested in Owning and Using DAT Recorders	
Base:	(246)	(246)
	%	%
	Currently Tape [1]	*Would Tape* [2]
A radio program	66	49
A record I own	62	77
A purchased pre-recorded cassette tape I own	57	76
A tape I had previously made from any pre-recorded music source	52	61
A tape someone else had made from any pre-recorded music source	52	57
A purchased pre-recorded cassette tape I borrowed	51	75
A record I borrowed	38	71
A compact disc I own	37	64
Me, a family member or a friend performing music	31	49
A compact disc I borrowed	30	66
Lectures, dictation, or anything else other than music	28	29

[1] *(Q.: "I'd like to know what kinds of things you recorded the music from. As I read each possible source, please tell me if you taped music from it in the past 12 months. Did you tape music from...?")*

[2] *(Q.: "I'm going to read you a number of things that you might record with the DAT recorder. As I read each one, please tell me if you think it is something that you, personally, would tape with a DAT recorder. Would you tape...?")*

Use of DAT Recorders

Highlighting the data on specific uses of DAT is the fact that one-third of pre-recorded music tapers say that, if they had a DAT recorder available, they would make more tapes of pre-recorded music than they do now.

More significant, however, is that among others who are interested in owning and using DAT, even greater numbers (41%) say they would make more tapes of pre-recorded music than they do now; and among current non-tapers of pre-recorded music who express an interest in owning and using DAT, over half (52%) say they would make tapes of pre-recorded music. This indicates that DAT technology will encourage a portion of people who are currently non-tapers of pre-recorded music to become pre-recorded music tapers.

Use of DAT Recorders to Make Tapes

	All Those Interested in Owning and Using DAT	*Current Pre-recorded Music Tapers Who are Interested in Owning and Using DAT*	*Current Non-tapers Who are Interested in Owning and Using DAT*
Base:	(371)	(246)	(125)
	%	%	%
If I Had a DAT Recorder:			
Would make more tapes of pre-recorded music than do now	41	34	52
Would make fewer tapes of pre-recorded music than do now	1	2	1
Would make same number of tapes of pre-recorded music	56	61	46
Don't know	2	3	1

(Q.: "If you had this digital audio tape recorder, do you think you would make more tapes of pre-recorded music than you do now, make fewer tapes, or make about the same number of tapes as you do now?")

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Fairness of Royalty Fee

After having been read a statement about the current situation with respect to royalty payments for the creators of music*, opinion is somewhat divided on whether it would be fair to charge a fee on the purchase of audio recorders and/or blank tape to pay creators a royalty for their work.

Among the total public (age 14 and over) half believe that such a fee would be unfair, while about 4 in 10 regard it as fair. Pre-recorded music tapers are more inclined to see such a fee as not fair (57%), while a majority (52%) of younger persons are on the side of fairness.

Fairness of Charging Royalty Fee on Recorders and/or Blank Cassette

	Total	*Pre-recorded Music Tapers*	*14-17 Year-olds*
Base:	(1504)	(606)	(156)
	%	%	%
Total Agree	39	38	52
Strongly	11	10	12
Somewhat	28	28	40
Total Disagree	49	57	45
Strongly	30	37	22
Somewhat	19	20	23
Don't know	12	5	3

* "Those who create music receive a payment or royalty whenever a recording of their work is sold, similar to the royalty paid to the author of a book. When a record, a pre-recorded cassette, a compact disc, or music from the radio is taped at home, the creator does not receive a royalty payment for his or her work."

(Q.: "Knowing this, how strongly do you agree or disagree that it would be fair to charge a fee on the purchase of audio recorders and/or blank cassette tapes and use the money to pay the creators for their work? Do you agree strongly, agree somewhat, disagree somewhat, or disagree strongly that charging such a fee would be fair?")

Exhibit B

BIEM/CISAC TECHNICAL COMMITTEES

"Documentation and Distribution" and "Data Processing"

Mexico City, November 7th and 8th, 1989

CT/89/1481

Distribution of Audio/Video Home Taping Royalties

BIEM Report

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AVD/mm
(January 1990)

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CT/89/1481

Distribution of Audio/Video Home Taping Royalties

BIEM Report

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AVD/rm
(January 1990)

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INTRODUCTION

This report is a summary, up-to-date on January 20th 1990, of information concerning home taping received from the following Societies:

South Africa	SARRAL
FGR	ZPU, GEMA, VG BILD-KUNST, VG WORT, GVL, VGF, GWFF, VFF, GÜFA
Argentina	SADAIC
Australia	AMCOS
Austria	AUSTRO-MECHANA, LITERAR-MECHANA, VBK, LSG, OSTIG, VAM, VG RUNDFUNK
Belgium	SABAM
Canada	SODRAC, CMRRA, SOCAN
Congo	BCDA
Denmark	NCB
Spain	SGAE
USA	THE HARRY FOX AGENCY
Finland	TEOSTO
France	COPIE-FRANCE, SORECOP, SACEM/SDRM, SACD, ADAMI, SGDL
Greece	AEPI
Hungary	ARTISJUS
Iceland	STEF, IHM
Italy	SIAE
Japan	JASRAC
Norway	TONO
Netherlands	STEMRA
Poland	ZAIKS
Portugal	SPA
United Kingdom	MCPS
Sweden	STIM

For ease of reference, this report deals with the various questions in the order in which they appear in the survey (Document No. 421) disseminated by the BIEM Secretariat General (cf. Appendix 1) and supplemented by an update request No. 1033 dated August 2nd, 1989 (cf. Appendix 2).

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1. General questions

1.1. Statutory and regulatory references

a) Countries with legislation

At present, the Societies of twelve countries are able to supply statutory and regulatory references, which are given in Appendix by country (cf. Appendix 3).

In these countries, the levy on home taping of audio and video recordings applies to tapes and recording equipment, according to the following breakdown:

	Recording equipment	Tapes
A	Germany (FGR)	Germany (FGR)
U	Argentina	Argentina
D	Spain	Australia (*)
I	Iceland	Austria
O	Portugal	Congo
		Spain
		Finland
		France
		Netherlands (**)
		Hungary
		Iceland
		Portugal

(*) Principle of the law on home taping royalties accepted, but no legislative references. By virtue of the 1988 act amending the copyright act, which received the royal assent on May 27th 1989, copyright on a work appearing on a phonogram is not infringed by making a private copy, provided that the copy be for private use and be executed on a similar medium. Royalties may be demanded for any sale, rental or import operation. According to Billboard (No. 37 dated September 16th 1989), the actual cost of these royalties, which will take effect in July 1990, will be about 50 to 75 Australian cents for a 90-minute tape. The royalties collected will be distributed as follows: one third to the audio media copyright owners, one third to the owners of copyright on musical works, and one third to the artists and performers. A fund containing 15% of the sums collected will be assigned to promotion and arsistance for the musical industry in Australia. The fund will be managed by Ausmusic, an organization run jointly by the Government and the Australian music industry. Ausmusic hopes to collect about Aus $ 300,000 to 400,000 annually. The home taping royalty will apply to the Australian repertoire and the repertoires of those countries granting reciprocal rights. Exemptions are planned for the blind and for those who copy works without intending to infringe on copyright.

(**) Act instituting a royalty on video tapes and audio tapes, including unrecorded DAT tapes, erasable CDs and "write once" CDs. The amount of the royalty has not yet been fixed. According to STEMRA, the draft act prepared by the Ministry of Justice has been accepted by one House of Parliament and will soon be submitted to the other House. This Act is due to come into force in 1991.

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	Recording equipment	Tapes
V I D E O	Germany (FGR) Spain Iceland Portugal	Germany (FGR) Austria Congo Spain Finland France Netherlands Hungary Iceland Portugal

Nature of royalty:

Germany	Remuneration (GEMA), particular right (BILD-KUNST).
Argentina	Nature of right not specified.
Australia	Nature of right not specified.
Austria	Reproduction right (AUSTRO-MECHANA).
Congo	Nature of right not specified.
Spain	Collection having the nature of a remuneration.
Finland	Collection constituting a new particular right.
France	Reproduction right.
Netherlands	Nature of right not specified.
Hungary	Remuneration taking the form of a reproduction right.
Iceland	Remuneration assimilated to copyright of a particular kind, namely, a combination of a reproduction right and a performing right covering the fixation operation and private use of the reproduced work.
Portugal	Royalty taking the form of a remuneration.

b) Countries without legislation

The countries which have not yet adopted legislation on home taping royalties are listed below with a summary of their respective positions.

South Africa (SARRAL) - No attempt has yet been made to adopt a home taping levy, although some contacts were made with the government two years ago. The government appeared favourable on the whole, but concerned by questions of reciprocity. The adoption of regulations on this matter by various European countries is an incentive for South Africa to re-examine the question.

Belgium (SABAM) - Belgian law is still silent on the subject of home taping, in spite of a bill drafted by Senator Lallemand which is at present under examination by the Senate. No date can be given for the adoption of the text.

Chapter IV of the bill provides for a royalty for authors, performers and the producers of phonograms and videograms, and in return recognizes the legal right of persons to make a copy for their private use.

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This remuneration will be collected from the manufacturer or importer when the unrecorded media are distributed on the national territory.

A royalty may also be collected on reproduction equipment by royal decree.

The amount is fixed at 8% of the sale price, and this rate may be altered by royal decree after consulting with the copyright owners concerned.

Half of the royalty proceeds will be distributed to the authors, performers, the producers of phonograms and/or videograms (with one third of the sum being awarded to each).

The other half of the proceeds will be distributed to the three cultural communities in the country, which shall be responsible for paying this sum to an organization to assist in creation, training and distribution.

The copyright owners concerned must be members of a management and distribution society.

Provision is made for reimbursement to producers, broadcasting organizations, the purchasers of reproduction equipment for scientific, medical or teaching purposes, and to associations for the handicapped.

The remuneration is exempted from value-added tax.

Legal penalties of a general nature are provided for to ensure compliance with these provisions.

Canada (SODRAC, CMRRA, SOCAN) – The legislative changes enacted in Canada in the middle of 1988 made no provisions for home taping royalties. At the time, it was planned that such provisions would be brought in during the second part of the legislative reforms on copyright. However, there are signs that this will not happen, with the Government apparently expressing reservations concerning this legislation. User groups are lobbying strongly for the rejection of the concept of home taping royalties, while in spite of these problems, the copyright owners concerned continue to lobby the Government and individual members of parliament to persuade them that a royalty is necessary and fair.

European Economic Community – At the end of 1987, Mr. J.L. Tournier, as Chairman of the BIEM Management Committee, wrote to Lord Cockfield, Vice-Chairman of the EEC Commission, to ask him to establish Community legislation for a levy on audio and video equipment and tapes.

On January 26th 1988, in the Council of Europe, a recommendation (No. R(88)1) was issued by the Ministerial Committee to the member States in favour of a levy on audio and audiovisual home taping.

Finally, in the Green Paper on copyright matters, the Community authorities expressed the view that:

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- Analogue taping was not widespread enough to justify measures on the Community level;

- Digital audio taping (DAT) justified the search for a technical solution on the Community level.

On the occasion of the hearings of the Commission of the European Communities in Brussels on December 1st and 2nd 1988, the BIEM filed an official statement concerning the state of development of home taping on its territory, and also setting out its opinion concerning measures to be adopted at the Community level. Verbal comments were also made by the BIEM and CISAC during these hearings.

Finally, at the recent agreements signed at Athens between the record industry and the manufacturers of DAT reproduction equipment, at which the BIEM was represented by the Chairman of its Management Committee, it was agreed:

- To adopt the so-called "Serial Copy Management System" to restrict DAT copying in the digital audio field (the system allows several copies to be made from an original copy, but not copies of copies);

- To encourage the efforts made by copyright owners in various countries with a view to adopting legislation providing for a home taping royalty which has received the support of European manufacturers of copying equipment.

These developments are in line with the principles adopted shortly beforehand by the BIEM, CISAC, IFPI and other professional organizations of copyright owners on the occasion of a joint statement made in August 1989. They are also in line with a resolution adopted subsequently by the BIEM General Meeting which was held in Paris on September 18th and 19th, 1989. At the MIDEM in January 1990, the representative of the Commission of the European Communities declared himself in favour of an analogue taping royalty, and a technical solution possibly involving a royalty on digital audio taping.

Denmark (NCB) - The government tax on video tapes (recorded **and** unrecorded), which came into force on July 1st 1982 and provided for a royalty of DKR 25 per copy plus DKR 5 per hour in excess of two hours, was removed.

In the near future, NCB in conjunction with recording artists and record producers will lobby the recently appointed Minister of Cultural Affairs to adopt regulations concerning home taping in Denmark.

USA (The Harry Fox Agency) - The question of a possible home taping royalty in the United States is still under study by Congress, on the basis of a report dated October 30th 1989 by its Bureau of Technology, the conclusions of which are mitigated.

Greece (AEPI) - In spite of several discussions with the Government on concrete proposals, no final answer has been given concerning a draft law on home taping.

Ireland (MCPS) - No legislation on home taping is at present in force and there is no plan to change the legislation on copyright.

Italy (SIAE) - Plans to establish a levy on unrecorded tapes and audio and video recording equipment have been put forward at government level, in the Standing Consultative Committee for

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Copyright (Comitato Consultivo Permanente per il Diritto d'Autore) to the Chairman of the Ministerial Council.

The Chairman recently published a "Schema di Relazione" designed to present the draft order by which Parliament is to entrust the Government with drawing up the new Copyright Act amending Act No. 633 of 1941, also with reference to home taping.

The "Schema di Relazione" provides, among other aspects of the reform, as follows:

- To regulate private and personal use, especially in the field of reprography and audio, visual and audiovisual recordings (records, music cassettes and other phonograms, video cassettes, video discs and similar media) in order to safeguard the moral and economic interests of the authors and other copyright owners such as recording artists and performers and phonogram and videogram producers, while also taking into account the need for international harmonization of standards in view of the solutions recently adopted in the Federal German Republic, Austria, France, Finland, Iceland, Hungary, and so on.

On December 18th 1987 a draft bill was put before the Chamber of Deputies.

Among the various provisions concerning amendments or additions to legislation in force, Article 4 provides as follows:

- (rights for non-profit recordings);

1) The authors and producers of phonograms and videograms and their assigns, without prejudice to the rights recognized by Act No. 633 of April 22nd 1941 and by its successive amendments and incorporations, are entitled to demand, for the private reproduction of phonograms and videograms for personal use and on a non-profit basis, a remuneration corresponding to 10% of the price of sale to the retailer of analogue tapes or recording equipment (music cassettes, video cassettes or other media) and recording devices having only one tape player.

2) This remuneration is fixed at 20% for digital tapes and similar recording media (music cassettes, video cassettes, records, video discs or other media), for digital recording equipment and for recording devices having two or more tape players.

3) The remuneration shall be due from whosoever produces on the territory of the State, or imports into it, for commercial purposes, said equipment, tapes or similar media.

4) The levy on audio tapes, records and similar media and on audio recording equipment shall be paid to the Società Italiana degli Autori ed Editori (SIAE), a public organization provided for under Article 180 of Act No. 633 of April 22nd, 1941, which shall distribute said levy, after deducting its costs, at a rate of 50% for authors and their assigns and 50% for the phonogram producers or their associations.

5) The phonogram producers shall share 50 percent of the remuneration due to them, under the terms of paragraph 2, with the artists or performers concerned. Relations concerning them shall be governed by collective agreements defined with the trade associations of the artists

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and performers. These agreements can, moreover, regulate the distribution of remunerations produced and to be produced in accordance with article 73, paragraph 1, of Act No. 633 of April 22nd 1941, as amended by article 2 of the decree of the Chairman of the Ministerial Council of September 1st 1975, published in the "Gazzetta Ufficiale" of September 20th 1975, No. 252. The provision of article 2 of said decree remains unchanged.

6) The levy on video tapes and other media (video cassettes, video discs or other media) and on video recording equipment shall be due to the producers of videograms who shall distribute it on the basis of collective agreements with the other copyright owners.

This draft is very specific, aiming only at amending certain points of the basic Act, even though initial reform work has already commenced on the Act.

The reason for this initiative has chiefly to do with legislative techniques. The aim is to achieve a provisional goal on specific points, using faster legislative procedures, unaffected by technical delays which may be caused by the expected (and normal) hindrances to reform.

Japan (JASRAC) - No legislation is as yet in force in Japan, but the establishment of a levy on home taping is at present under study by two organizations, namely:

- The tenth subcommittee for home taping royalties set up in June 1987, as part of the Copyright Council.

  This subcommittee consists of seventeen members representing the copyright owners (authors' Societies and organizations of artists and performers and audio and video producers), the manufacturers (audio and video equipment representatives and the manufacturers of unrecorded cassettes), and a group of consumers and legal experts.

  This subcommittee has already met eleven times and plans to establish a system of home taping levies.

- There is also an organization known as "Conversazione", responsible for examining copyright questions in a private organization formed by the Cultural Affairs Bureau, JASRAC, the Japanese Council of Performers' Organizations, JPRA, manufacturers of audio and video equipment, manufacturers of magnetic tapes, legal experts, etc.

  The organization was set up by the Cultural Affairs Bureau after the failure of the fifth subcommittee which was unable to reach a conclusion concerning the need for setting up a home taping levy after discussing the question for four years from 1977 on.

  The "Conversazione" held thirty-five series of meetings from 1982 to 1987 and recommended to the Commissioner of the Cultural Affairs Bureau that the tenth subcommittee be set up to re-examine these questions in the light of foreign examples with respect to home taping. This organization still exists at present.

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The present plan can be summarized as follows:

- Levy applicable to equipment and tapes in the audio and video fields;
- The levy would be in the nature of a compensation for copyright and neighbouring rights and would therefore not be in the nature of a tax or duty;
- Single, centralizing collecting body.

It should be noted that the representatives of copyright owners in Japan greatly regretted the decision to do away with the home taping levy in the United Kingdom, due to the possible negative effect on the Japanese authorities.

Poland (ZAIKS) – Polish legislation concerning copyright provides for no remuneration for home taping, but a change in this situation is under discussion within the framework of the draft bill on copyright.

United Kingdom (MCPS) – On the occasion of adopting the new legislation on copyright, the government took the regrettable decision to withdraw the plan to introduce a home taping levy contained therein, following a ministerial reshuffling.

Nevertheless, the legislation has been amended to give the government powers to set up a system of levies on home taping provided that the question of reimbursements to the blind and to other disadvantaged persons can be solved. It is not certain that this provision will remain in the legislation.

1.2. Taxes and duties

The following countries have or have had a system of home taping levies in the form of a tax or duty.

Denmark (NCB) – As mentioned above, the duty no longer exists.

Norway (TONO) – The levy applicable to home taping is in the nature of a tax.

Date of the Act: June 12th 1981; came into force on January 1st 1982; amended on July 1st 1982.

	Audio	Video
Recording equipment:	Yes	Yes
Tapes:	Yes	Yes

Collecting body: Customs authorities and the Ministry of Finance for all categories of beneficiaries.

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Rate:

	Audio	Video
Recording equipment:	17.5% of wholesale price (excluding VAT)	17.5% of wholesale price (excluding VAT)
Tapes:	KRN 1.5 per tape irrespective of its length	KRN 1.5 per tape irrespective of its length

A collective share exists by virtue of a decree of the Ministry of Finance. Foreigners are excluded and the allocation modalities are not provided for in the texts.

Distributing organization: Norsk Kassetav Giftsfond NKAF.

Type of repertoire concerned:

- Musical — Phonogram producers
- Dramatic — Videogram producers
- Literary — Film producers.

Difference in treatment for foreigners and nationals.

No tax is applicable on value added or turnover.

Date of payment: 20 days following the expiry of each term, pursuant to law.
Date and frequency of distribution: once a year.

In the event of non-payment, civil penalties exist through legal measures.

There are exemptions for exports and for delivery to ships and aircraft exercising an activity abroad.

There is no specialized organization to manage the funds for the collective share. There are no separate provisions for unrecorded digital audio tapes.

Absence of litigation, import control measures and termination of contracts by importers.

Amounts collected (individual share audio/video):

(Million Crowns)

1983	5
1984	7
1985	9
1986	10
1987	25
	56

Share granted to Norsk Kasset Giftsfond in 1987: 25 million Crowns, or a total collection of 95 million Crowns.

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Distribution of authors' share in 1986:

NOK recording performers	1,050,000	
Phonogram producers	1,575,000	
Stage	975,000	
Text	525,000	
Music	1,500,000	
Video/Film	1,875,000	
Sub-Total for 203 projects		7,500,000
20 projects at the disposal of the Administrative Council	795,000	
Music videos	750,000	
Administrative costs	980,000	
		+ 2,525,000
Grand Total		= 10,025,000

Sweden (STIM) - The levy applicable to home taping is also in the nature of a tax levied on blank audio tapes and on blank and recorded video tapes.

Date of the Act: June 24th 1982 (SFS 1982: 691 as amended), which came into force on September 1st 1982.

	Audio	Video
Recording equipment:	No	No
Tapes:	Yes	Yes (blank or recorded)

Rate:

	Audio	Video
Blank tapes	KRS 1.5	KRS 15 (blank or recorded)

Collecting body: Customs authorities for imports and central Authority for collecting the tax.

Revenue collected by the government and allocated in the field of music to authors (STIM), producers (IFPI) and musicians (SAMI):

Year	Revenue (million Crowns)	Allocation to the field of music (STIM, IFPI, SAMI)
82/83	15	8
83/84	30	8
84/85	50	5
85/86	80	3
86/87	86	3
87/88	258 100	3
88/89	125	3

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STIM, IFPI and SAMI have agreed to share the annual amount as follows:

STIM (composers)	40%
IFPI (producers)	30%
SAMI (musicians)	30%

The share awarded to STIM is distributed among the members of STIM including Swedish sub-publishers.

Distribution is performed according to the royalties for representation rights paid by STIM for radio and television and royalties for mechanical rights paid by STIM/NCB for the sale of records on Swedish territory.

A minor part (20%) of these funds is allocated for cultural purposes to the development of music (distribution cost: KRS 25,000 to 50,000).

In 1983, the government committee responsible for reviewing the copyright law proposed the establishment of a home taping levy. This project was examined by the Ministry of Justice in conjunction with the project to amend the copyright act relating in particular to copies of protected works for private use. It is hoped that this attempt will also lead in Sweden to a home taping levy for reproduction of a copyright nature.

1.3. Beneficiaries of the home taping levy

The following countries, which have opted for a system of home taping levies as opposed to the tax system described above, gave the following details concerning the beneficiaries of the levy.

Germany (GEMA, BILD-KUNST, WORT, ZPU) - The method for establishing the levy is fixed by law and the distribution key by contract:

	Recording equipment	Tapes
AUDIO	Authors 58% Producers + Artists + Others = 42%	Authors 58% Producers + Artists + Others = 42%

	Recording equipment	Tapes
VIDEO	According to Bild Kunst: 50% of total revenues	Authors 35% + Producers 65%

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Argentina (SADAIC) –

	Recording equipment	Tapes
AUDIO	Authors 45% Performing artists 25% Producers 25% National Arts Fund 25%	idem
VIDEO	idem	idem

Austria (AUSTRO-MECHANA) – The distribution key is based on a contractual agreement:

	Recording equipment	Tapes
AUDIO	Authors Producers Artists Others State	Authors 56% Producers 24% Artists 20% Others State

	Recording equipment	Tapes
VIDEO	Authors Producers Artists Others State	Authors 45.1% Producers 50.6% Artists 24.3% Others State

Congo (BCDA) – Distribution key which will be established by an order of the Administrative Council of the Congolese Copyright Bureau, to which all categories of authors in the Congo belong.

Spain (SGAE) – The key for distribution between the various boneficiaries established by Decree 287/1989 dated March 21st 1989 is as follows:

- 20% assigned to training and cultural promotion activities for authors and performing artists who are just starting out.

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- 80% distributed as follows:

Sound	Video	Books
Authors 40% Artists/Performers 30% Record producers 30%	Authors Artists/Performers 30% Video casssette producers 30%	Authors 55% Publishers 45%

Finland (TEOSTO) (*) - According to the copyright law, the beneficiaries of the levy are authors, performing artists, photographers and record producers.

The Minister of Education and the authors' Society (TEOSTO) decide each year on the individual share and on the collective use of the funds received. According to the copyright law, part of the funds received must be used for the collective benefit of the beneficiaries. Until now, one third was allocated for the individual share and two thirds for collective purposes.

The individual share is transferred to three organizations, namely TEOSTO, GRAMEX (performing artists and record producers) and KOPIOSTO (common organization representing forty-one different copyright organizations). The division is based on negotiations.

Each year, the Minister of Education approves a plan for using the funds collected. The beneficiaries of the collective share are listed in the plan. There are no fixed percentages for beneficiaries or groups of beneficiaries. The percentages vary.

France (SACEM/SDRM, SACD, SCAM, SPADEM, ADAGP) - The distribution key is based on article 36 of the act dated 3.7.85.

	Recording equipment	Tapes
A	Authors	Authors 50%
U	Producers	Producers 25%
D	Artists	Artists 25%
I	Others	Others 0%
O	State	State

	Recording equipment	Tapes
V	Authors	Authors 1/3
I	Producers	Producers 1/3
D	Artists	Artists 1/3
E	Others	Others
O	State	State

(*) For an example of distribution in Finland, cf. the reports submitted by TEOSTO and KOPIOSTO at the meetings of the BIEM/CISAC Technical Committees in Mexico City on November 7th and 8th, 1989.

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Hungary (ARTISJUS) – Distribution by fixed decree

	Recording equipment	Tapes
A	Authors	Authors 50%
U	Producers	Producers 20%
D	Artists	Artists 30%
I	Others	Others
O	State	State

	Recording equipment	Tapes
V	Authors	Authors 70%
I	Producers	Producers
D	Artists	Artists 30%
E	Others	Others
O	State	State

Iceland (STEF, IHM) – Distribution key fixed by contract between the parties concerned, with confirmation by the government.

	Recording equipment	Tapes
A	Authors 46%	Authors 46%
U	Producers 27%	Producers 27%
D	Artists 27%	Artists 27%
I	Others	Others
O	State	State

	Recording equipment	Tapes
V	Authors) Not yet	Authors) Not yet
I	Producers) fixed	Producers) fixed
D	Artists) for the year	Artists) for the year
E	Others	Others
O	State	State

Portugal (SPA) – Distribution key remaining to be fixed by a decree which has not yet been promulgated. By a letter dated 11.9.89, the SPA informed the BIEM that the legislation enforcing the Act has still not been adopted. The BIEM General Meeting, held in Paris in September 1989, had its attention drawn to this problem, which has existed for four years now.

Beneficiaries of the home taping levy:

- Authors
- Artists and performers
- National phonogram and videogram producers
- State (Cultural Promotion Fund).

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1.4. Rate and scope of the levy

The rate and scope of the levy are summarized below for each country.

A. Lump sum

Per recording device

	Country	*Nature of lump sum*	*Amount*
AUDIO	FGR	Per device	DM 2.50
VIDEO	FGR	Per device	DM 18

Per tape

	Country	*Nature of lump sum*	*Amount*
AUDIO	FGR	Hourly	DM 0.12
	Austria	Hourly	SA 2.40 (without contract) SA 1.60 (with contract)
	Finland (**)	Minutes	MF 0.03
	France	Hourly Minutes	FF 1.50 FF 0.025 (Art. 1, decision dated 30.6.1986)
	Iceland	Per tape	CI 24.50 ($ 0.53)
VIDEO	FGR	Hourly	DM 0.17
	Austria	Hourly	SA 3.85 (without contract) SA 2.56 (with contract)
	Finland	Minutes	MF 0.06
	France	Hourly Minutes	FF 2.25 FF 0.0375 (Art. 2, decision dated 30.6.1986)
	Iceland	Per tape	CI 73.51 ($ 1.60)

(*) A reduction of 6% to 6.5% is applicable to the rates prevailing in Germany in the event of signature by the users of a general contract. 263

(**) MF 3.00 per tape.

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B. Percentage

	Country		*Scope*	*Percentage – rate*
	Argentina		Sale price	10%
AUDIO	Hungary			
		Tapes:		
			Producer price, excluding VAT for national products	8%
			Wholesale price, excluding VAT, for imports	8%
	Iceland			
		Recording equipment:		
			Price for the importer or producer	4%
VIDEO	Argentina		Sale price	10%
	Hungary		Same rule as above	
	Iceland			
		Recording equipment:		
			Same rule as above.	

C. Countries in which regulations are pending to fix the scope and rate of the levy

Congo – A decree is pending which will probably fix the rate of levy applying to manufactured and imported audio and audiovisual tapes at 10% of the wholesale price, excluding VAT.

Spain

Portugal

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I.5. Shares allocated to copyright owners and for socio-cultural purposes

Countries where such legislation exists	Countries where such legislation exists	Method of determination	Type of collective share administration and method	Quantum	Foreigners' participation in the collective share	Criteria for expenditure or allocation of the collective share
Germany	Austria	Law and distributing body	Private nature, administered by the competent Society	Copyright owners: 49%. Collective purposes: 51% of total collection after deducting administrative costs for the audio and video fields	No, except in some cases in the cultural field	Act, art. 11 § 16 amended in 1980 and 1986
Congo: regulations pending	Spain	Act + Decree 287/1989 dated 21.3.89		20% for authors and performing artists just starting out		Training and cultural promotion
	Finland	Act 442/84 art. 26 a/1 and 26/b, negotiation between the Ministry of Education and the distributing body	Administered by the beneficiaries themselves	Copyright owners: 1/3 Collective purposes: 2/3 in the audio and video fields	No legislative barriers to participation by foreigners	Art. 39 of the Decree on copyright

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1.5. Shares allocated to copyright owners and for socio-cultural purposes (cont'd)

Countries where such legislation exists	Countries where such legislation exists	Method of determination	Type of collective share administration and method	Quantum	Foreigners' participation in the collective share	Criteria for expenditure or allocation of the collective share
	France	Art. 38 Act of 3.7.85	Private nature and administered by each copyright owners' Society	25% for audio and video	Yes	Art. 38 § 5. Act of 3.7.85. actions to aid creation & dissemination of live shows and actions to train performing artists
Hungary						
	Iceland	Articles of Association of the collecting body IHM	Public, administered by the IHM administrative council and a representative of the Ministry of Education who chairs the fund	15% for audio and video	Yes, but hard to apply in practice	Aid for the publication of audio and video tapes
Portugal: regulations pending (*)						

(*) Idem for the remainder of the document.

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1.6. Collecting body

Country	Name	Legal form	AUDIO		VIDEO	
			Recording Equipment	Tapes	Recording Equipment	Tapes
Germany	ZPU	Non-commercial Company managed by GEMA	Yes for all categories of copy-right owners	Idem	Idem	Idem
Austria	AUSTRO-MECHANA	Private company		Yes for all categories of copyright owners		Yes for all categories of beneficiaries
Congo	BCDA	Trade association set up by decree		Yes for all authors		Yes for all authors
Spain	SGAE	Regulations pending				
Finland	TEOSTO	Private company		Yes for all categories of beneficiaries		Yes for all categories of beneficiaries
France	SORECOP	Non-commercial Company (Title IV, Act of 3.7.85)		Authors, Artists, Performers, Producers		
	COPIE FRANCE	Non-commercial Company (Title IV, Act of 3.7.85)				Authors, Artists, Performers, Producers

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1.6. Collecting body (cont'd)

Country	Name	Legal form	AUDIO		VIDEO	
			Recording Equipment	Tapes	Recording Equipment	Tapes
Hungary	ARTISJUS	Official State Bureau		Yes for all categories of beneficiaries		Idea
Iceland	IHM	Federation of authors' Societies which take part in it but without holding shares in the capital		All categories of beneficiaries		

Different collecting body:

1. Cost of intervention in the case of a body different from that answering the survey:

Germany	ZPU	7%	
France	SORECOP	4%	in 1987/1988, provisional
		3%	in 1989, provisional
	COPIE FRANCE	3.5%	in 1987, provisional
		1%	in 1988, provisional
		0.5%	in 1989, provisional

Surplus collections to cover management costs were distributed as early as 1987 by COPIE FRANCE and the following year by SORECOP

Iceland	IHM	12% of revenues

2. Nature of legal ties:

France SDRM holds 50% of the registered capital of SORECOP and 1/3 of the capital of COPIE FRANCE.

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1.7 Distribution among the copyright owners
(the relevant repertoires are marked with a cross)

Country	Distributing Body	Repertoires: Musical	Dramatic	Literary	Graphic & Plastic Arts	Others	Share attributed to each (%)
Germany	ZPU	X	X	X			Cf. page 25, table of distribution in Germany
Austria	AUSTRO-MECHANA	X	X (Dramatico-musical)				Audio / Video AUSTRO-MECHANA 49% / 28.7% LITERAR-MECHANA 7% / 14.8% LSG-Leistungsgesellschaft 34% / 4% OSTIG-Österr. Interpretengesellschaft 3% / 2.3% VAM-Verwertungsgesellschaft für audiovisuelle Medien - / 22.8% VBK-Verwertungsgesellschaft Bildender Künstler - / 1.6% VG Rundfunk 7% / 25.8%
Congo	Regulations pending						
Spain	Regulations pending						
Finland	TEOSTO KOPIOSTO	X Authors in the field of music				Writers, translators, journalists, directors, stage designers, photographers, illustrators, actors, etc.	

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1.7 Distribution among the copyright owners (cont'd)

Country	Distributing Body	Repertoires: Musical	Dramatic	Literary	Graphic & Plastic Arts	Others	Share attributed to each (%)
France	SACEM	X				American film and TV film producers (rights other than musical rights)	Home audio taping 1987-88: 93.88% Home audiovisual taping 1987: - Musical 30.46% - American producers (rights other than musical rights) according to rights transfers received by SACEM
	SACD		X	X		Idem	
	SDRM	X	X	X	X	Idem	Home audiovisual taping 1987-88: - Musical 93.88% - Dramatic 4.12% - Literary 2% Home audiovisual taping 1987: - Musical 30.46% - Dramatic 40.40% - Literary 6.45% - Graphic art 0.79% - American producers 21.90% (rights other than musical)
Hungary	ARTISJUS (Department of Distribution and Documentation)	X	X	X			Audio: - 50% authors, of which 75% is distributed with and according to musical and literary mechanical royalties and 25% with & according to musical radio royalties - 30% performing artists - 20% phonogram producers

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1.7 Distribution among the copyright owners (cont'd)

Country	Distributing Body	Repertoires: Musical	Dramatic	Literary	Graphic & Plastic Arts	Others	Share attributed to each (%)
Hungary (cont'd)	ARTISJUS						Video - 70% authors and film producers, of which 40% to composers and scriptwriters, including 1/3 with and according to general musical royalties and 2/3 with and according to musical film royalties. Remain to be distributed: 35% literary & dramatic authors & film directors, etc., and 25% for film producers - 30% performing artists
Iceland	According to the IHM Articles of Association: IHM member Societies must distribute to their members but in practice no group, including STEF, has fixed its rules since the law came into force. Also resistance from big debtors who consider the law anti-constitutional and have paid with reservations.						

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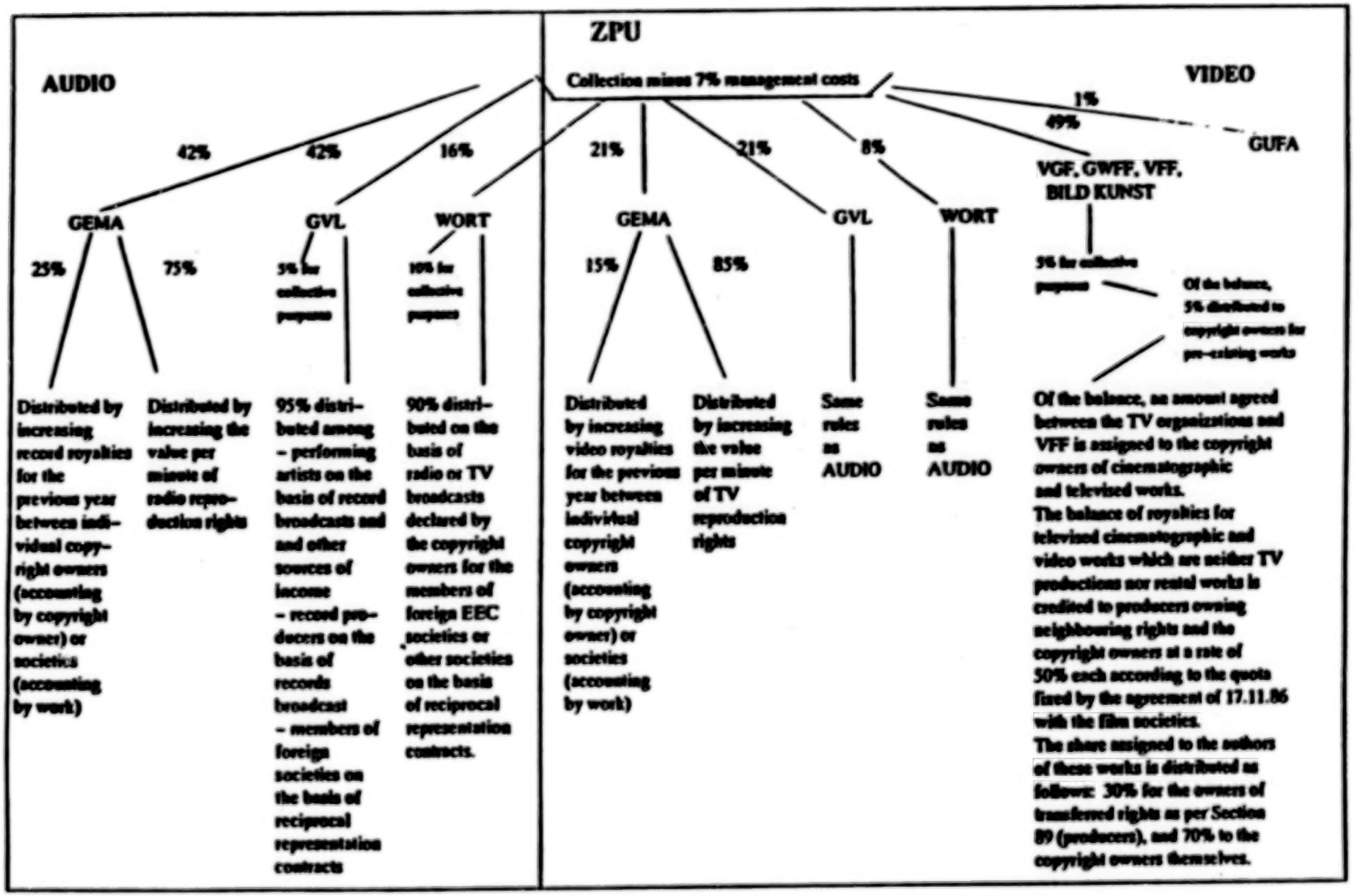
Table of distribution in Germany



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Difference of treatment between foreigners and nationals:

Germany:	Not specified
Australia:	Yes, reciprocity required with respect to foreign countries.
Austria:	No
Congo:	Not specified
Spain:	Idem
Finland:	Yes, except in the case of special agreements based on material reciprocity.
France:	No
Hungary:	No
Portugal:	Yes, home taping copyright is recognized for national authors only.

Methods for determining the share of each type of repertoire (surveys, programme sampling, etc.):

Germany:	Not specified
Austria:	Not defined
Congo:	Not specified
Spain:	Idem
Finland:	The shares are determined by the Societies, without any legal obligation.
France:	Surveys and programme sampling to obtain a knowledge of: - The main media from which home taping is performed; - The main types of works taped.
Hungary:	ARTISJUS distribution rules are fixed following a survey and analysis of TV programmes.

Methods of distributing the shares received by your Society (e.g. surveys, allocation to large groups):

Germany:	Not specified
Austria:	Distribution performed in addition to the mechanical right.
Congo:	Not specified.

Spain: Idem

Finland: Distribution performed in addition to the normal remunerations.

France: SACEM – Allocation of sums to works for which distribution is performed traditionally on the basis of survey results.
SACD – On the basis of half-yearly surveys, allocation by major categories of works and by distributor.

Hungary:
- Distribution performed in addition to the normal remunerations: audio home taping, authors' share; video home taping, composers' and scriptwriters' share.
- Transfer of the performing artists' share to the organization representing the artists (Syndicate).
- Transfer of record producers' share to HUNGAROTON, sole producer up until 1988.
- Remain to be defined: video home taping, literary and dramatic authors' share and film producers' share.

Cost of distribution operations:

Germany: Not specified.

Austria: Same cost as for mechanical rights

Congo: Not specified

Spain: Idem

Finland: Approximately 10% of TEOSTO's share

France: SACEM – 1.042% of distribution costs for audio home taping for 1987.
SACEM – 1.554% of distribution costs for audiovisual home taping for 1987.
SACD – 10% for 1987 (corresponding to the statutory withholding rate applied by the SACD on all sums collected for audiovisual rights, since it is impossible to isolate the actual cost of operations relating to home taping).

Hungary: Mechanical rights 10%; cost of distributing radio royalties calculated as a proportion of the deduction applicable to royalties for "petits droits" for music each year.

Cost of distribution operations in addition to the costs of the collecting body:

Germany: Not specified.

Austria: Nil

Congo: Not specified.

Spain:	Idem
Finland:	Nil
France:	SACEM/SDRM – See above SACD – Yes
Hungary:	No.

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2. Miscellaneous Questions

2.1. Taxes

Country	Liability to VAT or any other tax on revenues	Rate applying for the taxpayers	Rate applying for the beneficiaries	Possibility of recouping the tax by those liable to it	System to avoid cumulative margins
Germany	Yes	7%			
Austria	Yes	20% for the consumer	10% for the Society and for the publishers. 10% for the composer / author	Yes, general VAT system	Freedom for those liable to the tax
Congo	Not specified				
Spain	Idem				
Finland	Yes	Not specified	Not specified	Apparently not	No
France	Yes	18.60%	18.60% but the basis for calculation varies depending on the associated Societies	Not specified	Working instruction for tax legislation dated 12.9.86.
Hungary	No				
Portugal	No				
Iceland	No				

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2.2. Time schedule

The replies contain the following information concerning the dates and frequencies of collection and distribution:

Country	Collections		Distributions
	Dates and frequencies	Method of fixing dates and frequencies	
Germany	At delivery	Legal and contractual	Half-yearly
Austria	40 days after end of month of invoicing	Contractual	Annual
Congo	Not specified		
Spain	Idem		
Finland	Notification at the end of each manufacture or import month and invoicing with request for payment within 14 days	Legal and contractual. Dates and frequencies fixed by the Societies	Decided by the Ministry of Education, generally once a year
France	Manufacturers and importers known as "exclusive" agents and wholesale importers: payment every month on the basis of ex-stock movements. Statement filed the 20th of each month for the previous month: exclusive agents then have 80 days and wholesalers 40 days to pay. "Occasional" importers: payable at date of purchase	Article 6 of the decision of June 30th 1986 taken by the Commission set up in accordance with art. 34 of the Act of 3.7.1985	Quarterly as per the agreement between the associated societies SORECOP and COPIE FRANCE in the last ten days of the month following the quarter elapsed
Hungary	Half-yearly, in the 2 months following each half-year	Implementing order 14/A § 2	Execution rights: once a year; mechanical rights: twice a year
Iceland		Regulated	Quarterly

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2.3 Penalties for non-payment

Country	Civil penalties	Penal penalties
Germany	Action for information and payment	Action for fraud
Austria	High rates, interest	None
Congo	Not specified	
Spain	Implementing regulations are pending	
Finland	Obligation to pay damages	Fine or emprisonment for 6 months maximum
France	Common law	Article 56 of the Act of 3.7.85 providing for the penal penalties defined in article 426 paragraph 1 of the new Penal Code in case of non-payment
Hungary	Art. 52-53 of Hungarian Act No. III of 1969 Obligation to pay damages	
Iceland	Yes	Yes

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2.4. Exemption and reimbursement procedures

Germany: Pursuant to article 54, paragraph 3 of the German Copyright Law, there exist exemptions for exports.

Austria: Procedures exist pursuant to article 42, Chapter 7 of the Copyright Law.

Congo: Not specified

Spain: Idem

Finland: Article 26 e4 leaves the right of deciding exemption up to the Minister of Education. For example, the Minister has exempted all tapes on which programmes are recorded pursuant to article 21 of the Cable TV Act.

France: Article 37 of the Act of 3.7.85 provides for cases of reimbursement, while article 5 of the decision of 30.6.85 provides for cases of exemption.
Those concerned are:
- Audiovisual communications enterprises;
- Phonogram and videogram producers;
- Organizations using recording media to assist those with sight and hearing handicaps.

Remuneration is due only for media distributed in France.

Hungary: Payment of this remuneration cannot be claimed when:
- Distribution is performed on the export market;
- Blank audio or video recording media are reserved for equipment such as studio equipment or dictation machines which, if they are used for their normal purpose, are unsuitable for home taping.

Iceland: No

Portugal: Implementing regulations pending.

2.5. Specialized organizations

The following specialized organizations, responsible for collecting and spending part of the collective funds, have been inventoried:

Country	*Organizations*
Germany:	None
Austria:	None: each Society administers its own fund
Congo:	Not specified
Spain:	Implementing regulations pending

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Finland: Performing Music Promotion Center
Foundation for the Promotion of Finnish Music
KOPIOSTO (common organization representing 41 different organizations of authors, performing artists and publishers)

France: Foundation for Music and Audio Creation and Distribution (FCDMS)
Beaumarchais Foundation

Hungary: Trade Association of Workers in the Arts

Iceland: No

Portugal: Implementing regulations pending.

2.6. DAT

Are there different provisions from those applying to analogue tapes?

Germany: No, but the Federal Ministry of Justice proposes that the rate of royalties applicable to DAT equipment be four times higher than that applying to traditional equipment.

Austria: No

Congo: Not specified

Spain: Implementing regulations pending

Finland: No

France: No

Hungary: No

Iceland: No.

2.7. Litigation

Germany: Ordinary court; no particular litigation to be noted.
Litigation on the constitutional level.

Austria: Existence of a special jurisdiction (article III, 1980 amendment); litigation in progress before the higher jurisdiction and the constitutional court

Congo: Not specified

Spain: Not specified

Finland: None

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France: Common law courts; litigation which has arisen:
i) instigated by taxpayer groups
- Action before the Commission of the European Communities;
- Action for cancellation of the decision of 30.6.88 before the Council of State;
i) instigated by collecting societies
- Some common law disputes.

Hungary: Capital Court and County Courts; no litigation

Iceland: Common law courts; the levy was contested but no litigation at present.

2.8. Import control measures

Germany: Report by the German Office for Import Declaration Control (EKM) with assistance from the Customs authorities for the ZPU.

Austria: Collaboration with contractual partners and market monitoring by AUSTRO-MECHANA. No customs controls, but negotiations with the customs authorities are in progress.

Congo: Not specified

Spain: Idem

Finland: Right of communication with the Customs authorities for the authors' Societies to obtain a knowledge of imports. Each month, TEOSTO obtains a list of all imports (importers, number of tapes sold, etc.)

France: The law does not provide the means.

Hungary: No control measures or assistance from the Customs authorities, although negotiations are in progress with them.

Iceland: Being worked out with the help of the Customs authorities if necessary.

2.9. Termination of contracts

Germany: No provisions.

Austria: The problems previously encountered in Austria have been solved and there is now a regular contract for 1989, which was signed on July 22nd 1988.

Congo: No provisions

Spain: Idem

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Finland: No contract between the importers and the authors' Societies, since the levy is fixed by the Minister of Education. However, the importers complain that the levy is too high.

France: No, since there is no contractual system with the importers.

Hungary: No provisions.

Iceland: The rates for tapes have been disputed by the importers, who find them too high by comparison with the rate applicable to recording equipment (4% of the import price), which seems more reasonable.

X
X X

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Appendix 2 Revision request No. 1033 dated 2.8.1989
Appendix 3 Statutory and regulatory references
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Germany, Austria (AUSTRO-MECHANA, VBK), Finland (TEOSTO), France (SORECOP, COPIE FRANCE, SACEM/SDRM, SACD), Hungary, Iceland

BIEM

No. 421

SURVEY RELATING TO HOME TAPING LEVY

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2.7. Litigation

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2.9. Termination

Exhibits : Charts.

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1. General Questions

1.1. Statutory and regulatory references (*)

Date of the statute

Date of entry into force

Date of subsequent statutory and/or regulatory texts in enforcement

State whether the above texts apply only to

- the audio field
- the video field
- both

State whether the collection has the nature of

- a tax
- a levy or a remuneration

Is it a reproduction right or a new particular right ?

1.2. Questionnaire applicable in case of a tax or a duty (if your country applies a levy and not a tax or a duty, please go to item 1.3. of this questionnaire directly).

Scope of application of the tax :

Audio	Video
Recording equipment	Recording equipment
Tapes	Tapes

Beneficiaries of the tax (answer must equal 100 %) ex:
Authors 50 % Producers 25 % Artists 25 % Others 0 %

AUDIO

Recording equipment		Tapes	
Authors....	Producers....	Authors....	Producers....
Artists....	Others.....	Artists....	Others.....
State.....		State.....	

VIDEO

Recording equipment		Tapes	
Authors.....	Producers.....	Authors.....	Producers.....
Artists.....	Others.....	Artists.....	Others.....
State.....		State.....	

(*) Please send copies of relevant regulations with your reply.

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Institution in charge of the tax collection (ex: customs authorities, Ministry of Finances, etc.)

1.3. Beneficiaries of the levy.
Please state whether the method of assessing the home taping levy and the percentages of distribution are provided for into a statute, a decree, a contractual agreement, etc.

Beneficiaries of the home taping levy (answer must equal 100 %)
ex: Authors 50 % Producers 25 % Artists 25 % Others 0%

AUDIO

Recording equipment		Tapes	
Authors.....	Producers.....	Authors.....	Producers.....
Artists.....	Others.....	Artists.....	Others.....

VIDEO

Recording equipment		Tapes	
Authors.....	Producers.....	Authors.....	Producers.....
Artists.....	Others.....	Artists.....	Others.....

1.4. Rate and scope of the levy
Please state by filling out the following charts whether the levy is a lump sum payment (see A) and indicate its nature and its amount, or a percentage (see B) and indicate its scope and its rate.

A. Lump sum

Recording Equipment	Lump sum Nature (ex: Hourly/Minute rate)	Amount (ex: DM 2.50)
AUDIO		
VIDEO		

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Tapes	Lump sum Nature (ex: Hourly/Minute rate)	Amount (ex: DM 2.50)
AUDIO		
VIDEO		

B. Percentage

Recording Equipment	Scope: Gross Price 1 Tax excl.	Gross Price 1 Tax incl.	Retail Price Tax excl.	Retail Price Tax incl.	Percentage Rate
AUDIO					
VIDEO	286				

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Tapes	Scope: Gross Price		Retail Price		Percentage Rate
	Tax excl.	Tax incl.	Tax excl.	Tax incl.	
AUDIO					
VIDEO					

Shares attributed to the right owners and for socio-cultural purposes.

Does such distinction exist ? Yes No (*)

Who determines it (statute, decree, collecting or distributing body) ?

What is the nature of the collective share (private or public nature) and who administers it ?

What is its amount ?

Please state, where applicable, if the distribution between the right owners' share and the share for sbcio-cultural purposes is different in the audio or video field or if it is the same.

Are foreigners entitled to benefit from the collective share on the same footing as nationals ?

Are the conditions of spending of the collective share provided for in the texts (law, decree, etc.) which provide for the existence of such share (e.g. section 38 paragraph 5 of the French law) ?

(*) Cross appropriate box.

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1.6. Collecting body

Name : Legal nature :

	AUDIO		VIDEO	
	Recording Equipment (ex: Yes)	Tapes	Recording Equipment (Ex: No)	Tapes
Does the body collect for all of categories of beneficiaries ?				
If not, for which categories ?	(ex : Authors)			

If the collecting body is different from your society :

1. What is the cost of its intervention (percentage of the turnover, etc.)

2. What is the nature of its legal relationship with your organization (e.g. in France SDRM owns a share in the capital of SORECOP and Copie France).

1.7. Distribution

It is hereby stated that we are dealing with the distribution in favor of the authors.

Name of the distributing body :

Nature of the repertoires involved :

- musical
- dramatic
- literary
- graphical and plastic arts
- others - which ones ?

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Shares in percentage attributed to each of them:

- Difference of treatment between the foreigners and the nationals: Yes No (*)

- Method of determination of the share between each type of repertoire (poll, sample of programs, etc.). Are there legal obligations in this respect ?

- Methods of distribution of the shares received by your Society (ex: poll and brief description of the nature of the polls, allocation to large groups, which ones, etc.)

- Cost of your distribution operations (percentage of the rights collected by your Society)

- Is this cost added to the costs of the collecting body when such body is different from your Society ?

2. Miscellaneous Questions

2.1. Taxes

Is the home taping levy subject to value added tax (VAT) or to an equivalent turnover tax ?

If it is the case, at which rate between the hands of the tax payers ?

At which rate between the hands of the beneficiaries ?

Is there any possibility to recoup the tax for the persons subject to such tax ?

Is there a mechanism in order to avoid the scale of margins on the home taping levy (for instance in France, according to a ruling from the Tax Legislative Department, the payer of the home taping levy is bound to invoice such levy separately to is customers) ?

2.2. Calendar

Date and frequency of the collections : Is there a time difference between the accrual of the amount due (for instance in France the out of stock movement) and the date of payment (for

(*) Cross appropriate box.

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example in France again, the payment of the amount is due 80 days after the end of the month after the out of stock movement) ?

Is it the law or the contracting bodies which decide such dates and frequency of payment (for example in France, it is the decision voted pursuant to the law, in Austria it is decided by agreements) ?

Date and frequency of the distributions

2.3. Penalties in case of non payment

- civil:

- penal:

2.4. Exemption and reimbursement : Have some procedures been established ?

If it is the case, in which circumstances ?

2.5. Specialized organization

Are there collective organizations in charge of receiving and spending a portion of the funds of collective interests (for instance, such as the Foundation for the Creation and the Dispatching of Audio Music /FCDMS/, or the Beaumarchais Foundation in France) ?

2.6. DAT

Are these provisions different from those, applicable to analog tapes ? If it is the case, what are such differences ?

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2.7. Litigation

What are the courts having jurisdiction over possible disputes (ordinary tribunal, special court, arbitration court) and what are such proceedings ?
Did the enforcement of the law on home taping levy give rise to recourses (e.g. before the Supreme Court, the Court of the European Economic Community) ?

2.8. Measures of control of imports

Have you taken special measures for the control of imports ? If it is the case, which ones ?

Are you helped by the customs authorities in this respect ?

2.9. Termination

Have you noticed in your country (as it is the case in Austria) a trend of importers to terminate their agreements on the ground that the rate of your country is too high as compared with the rate of another country (for example Germany in the case of Austria) ?

If it is the case, in which circumstances ?

The following charts illustrate the different shares of collection with respect to home taping levy and you are kindly requested to review and complete such charts in order to grasp their differences.

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Chart of the global gross amount (i.e. exclusive of tax and before deduction of costs) of Home Taping Levy in your country

Please state below the amount of home taping levy attributed to the right owners (hereinafter referred to individual share) and the amount of home taping levy applied for socio-cultural purposes (hereinafter refe to as collective share).

Individual share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Vid
1983							
1984							
1985							
1986							
1987							
Total							

Collective share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Vid
1983							
1984							
1985							
1986							
1987							
Total							

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Chart of global gross amount (i.e. exclusive of tax and before deduction of costs) of Home Taping Levy attributed to authors

Please state below the amount of home taping levy distributed to the authors as right owners which is thereafter the subject of an individual distribution (referred to as individual share) and the amount of home taping levy for authors which is attributed by them to socio-cultural purposes (referred to as collective share)

Individual share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video
1983							
1984							
1985							
1986							
1987							
Total							

Collective share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video
1983							
1984							
1985							
1986							
1987							
Total							

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Chart of global gross amount (i.e. exclusive of tax and before deduction of costs) of Home Taping Levy attributed to your Society (or received by your Society)

Please state below the amount of home taping levy distributed by your Society to the right owners (thereafter referred to as individual share) and the amount applied by your Society for socio-cultural purposes (thereafter referred to as collective share)

Individual share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video
1983							
1984							
1985							
1986							
1987							
Total							

Collective share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video
1983							
1984							
1985							
1986							
1987							
Total							

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Appendix 2

BUREAU INTERNATIONAL
DES SOCIÉTÉS GÉRANT LES DROITS D'ENREGISTREMENT
ET DE REPRODUCTION MÉCANIQUE

SOCIETE CIVILE

PARIS, LE 2 Août 1989

A Messieurs les Directeurs Généraux
des Sociétés concernées du BIEM et
de la CISAC

Objet : Copie privée
Document BIEM No. CT/88/1625

Monsieur le Directeur Général,

En vue de l'Assemblée Générale du BIEM, les 18 et 19 septembre 1989 à Paris, d'une part, et pour les besoins de la Commission Technique BIEM/CISAC les 6/10 novembre 1989 à Mexico, d'autre part, je souhaite remettre à jour le document BIEM No. CT/88/1625 dont vous trouverez ci-joints deux exemplaires en anglais, s'agissant de la version la plus à jour dont nous disposons.

Pour ce faire, je vous serais obligé de bien vouloir m'adresser toutes informations en votre possession sur ce plan, au besoin en les reproduisant directement sur l'un des exemplaires ci-joints en vue de sa réexpédition par vos soins au Secrétariat Général du BIEM.

J'ai déjà dans mes dossiers certaines informations sur les récentes modifications intervenues dans différents pays (ex. Hollande, Espagne, Argentine etc...), mais je pense qu'il serait néanmoins utile que chaque Société effectue sa propre mise à jour par ce moyen.

Bien évidemment je suis particulièrement intéressé par les résultats des perceptions au titre de l'année 1988 et du 1er semestre 1989 pour compléter l'annexe 3 de ce document.

Vous remerciant par avance de votre réponse, que je souhaiterais recevoir dans la semaine du 4 septembre prochain, je vous prie d'agréer, Monsieur le Directeur Général, l'expression de mes sentiments les meilleurs.

Le Secrétaire Général

A. Vacher-Desvernais

Antoine VACHER-DESVERNAIS.

AVD/ChD/1033

56 AVENUE KLEBER, 75116 PARIS · TEL. : (1) 47 04 57 04 · TELEX : BIEM 643124 F · TELECOPIEUR : 47 55 11 53
SOCIETE GENERALE AGENCE AB 46 AVENUE KLEBER 75116 PARIS COMPTE 00400550

Appendix 3

Legislative references of countries which have adopted a home taping levy

Federal German Republic

Act of September 9th 1965 which came into force on January 1st 1966, as supplemented by the regulations of June 24th 1985.

Argentina

References not given.

Australia

Royal Assent dated May 27th 1989.

Austria

Act No. 321 of July 2nd 1980 which came into force on January 1st 1981 for audio tapes and on July 1st 1982 for video tapes (articles 42, 69, 74, 76, 87 UrhG).

Congo

Article 48 of the Act on Copyright and Neighbouring Rights (No. 24/82 dated July 7th 1982).

Spain

Act of November 11th 1987 which came into force on December 7th 1987.
Decree 287/1989 of March 21st 1989.

Finland

Act of June 8th 1984 which came into force on June 15th 1984. Decree in force since September 1st 1985.

France

Act of July 3rd 1985 which came into force on January 1st 1986. Decision of 30.6.86 fixing the rate and scope of the levy ("Journal Officiel" of the 23.8.1986), which came into force on September 8th 1986.

Netherlands

Act at present under discussion in Parliament.

Hungary

Decree implementing Copyright Act No. 9 of December 29th 1969, as supplemented by Decree No. 15MM of November 20th 1982, which came into force on January 1st 1983.

Iceland

Act of May 30th 1984 which came into force on April 1st 1985.

Portugal

Act No. 45/85 of September 17th 1985 (article 82) which came into force on September 22nd 1985.

Appendix 4

Collection Shares

Federal German Republic

Period from 1.7.1985 to 31.12.88

Equipment Industry	DM 160 million	Audio	DM 43 million (27%)
		Video	DM 116.8 million (73%)
Media Industry	DM 161.5 million	Audio	DM 54.7 million (34%)
		Video	DM 106.8 million (66%)
			Total = DM 321.5 million

Austria (AUSTRO-MECHANA)

1988, total collection

Home taping	Audio	AS 23,524,000
	Video	AS 83,113,000
		Total = AS 106,637,000

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Autriche
(AUSTRO-MECHANA)

Tableau du montant global brut (i.e. hors taxe et avant imputation des frais) de la copie privée dans votre pays

Veuillez préciser ci-après le montant des redevances affectées aux ayants droit (que nous appellerons part individuelle) et le montant des redevances affectées à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle (49%)

en millions SA

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983			7,461			6,548	14,009
1984			7,453			10,387	17,840
1985			7,661			16,958	24,619
1986			8,752			23,095	31,847
1987			9,837			34,303	44,140
Total			41,164			91,291	132,455

Part collective (51%)

en millions SA

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983			7,766			6,815	14,581
1984			7,757			10,810	18,567
1985			7,974			17,650	25,624
1986			9,109			24,037	33,146
1987			10,239			35,703	45,942
Total			42,845	298		95,015	137,860

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Autriche
(AUSTRO-MECHANA)

Tableau du montant global brut (i.e. hors taxe et avant imputation des frais) de la copie privée revenant aux auteurs

Veuillez préciser ci-après le montant des redevances affectées aux ayants droit Auteurs faisant l'objet d'une répartition et devant faire, ensuite, l'objet d'une répartition individuelle entre eux (que nous appellerons part individuelle) et le montant des redevances revenant aux auteurs et devant être affectées par eux à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle

en millions SA

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983			4,178			2,953	7,131
1984			4,174			4,684	8,858
1985			4,290			7,648	11,938
1986			4,901			10,416	15,317
1987			5,509			15,471	20,980
Total			23,052			41,172	64,224

Part collective

en millions SA

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983			4,349			3,074	7,423
1984			4,344			4,875	9,219
1985			4,465			7,960	12,425
1986			5,101			10,841	15,942
1987			5,734			16,102	21,836
Total			23,993			42,852	66,845

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Autriche
(AUSTRO-MECHANA)

Tableau du montant global brut (i.e. hors taxe et avant imputation des frais) de la taxe privée affecté à votre Société (ou reçu par votre Société)

Veuillez préciser le montant réparti par votre Société aux ayants droit (que nous appellerons part individuelle) et le montant affecté par votre Société à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle

en millions SA

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983			3,656			,879	3,535
1984			3,652			3,881	6,833
1985			3,754			4,867	8,621
1986			4,288			6,628	10,916
1987			4,820			9,845	14,665
Total			20,170			26,200	46,370

Part collective

en millions SA

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983			3,805			1,956	5,761
1984			3,801			3,103	6,904
1985			3,907			5,066	8,973
1986			4,463			6,899	11,362
1987			5,017			10,247	15,264
Total			20,993			27,271	48,264

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Autriche
(VBK)

Tableau du montant global brut (i.e. hors taxe et avant imputation des frais) de la copie privée revenant aux auteurs

Veuillez préciser ci-après le montant des redevances affectées aux ayants droit Auteurs faisant l'objet d'une répartition et devant faire, ensuite, l'objet d'une répartition individuelle entre eux (que nous appellerons part individuelle) et le montant des redevances revenant aux auteurs et devant être affectées par eux à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
				Sans.			
1983				81.293.-			Idem
1984				131.556.-			
1985				226.546.-			
1986				296.101.-			
1987				440.225.-			
Total				1,170.732.-			

Part collective

	AUDIO			VIDEO			Total annuel
				Sans			
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983				—			
1984				—			
1985				—			
1986				—			
1987				291.600.-			
Total				291 600			

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Finlande
(TEOSTO)

Chart of the global gross amount (i.e. exclusive of tax and before deduction of costs) of home taping levy in your country

Please state below the amount of home taping levy attributed to the right owners (hereinafter referred to as individual share) and the amount of home taping levy applied for socio-cultural purposes (hereinafter referred to as collective share).

Individual share

Year	AUDIO			VIDEO			Annual Total
	Tapes MILL FIM	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes MILL FIM	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video MILL FIM
1983							
1984	1.000			0.786			1.786
1985	3.723			5.141			8.864
1986	4.788			9.990			14.779
1987	4.646			10.269			14.915
Total	14.157 Mill FIM			26.186 Mill FIM			40.344 Mill FIM

Collective share

Year	AUDIO			VIDEO			Annual Total
	Tapes MILL FIM	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes MILL FIM	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video MILL FIM
1983							
1984	2.001			1.572			3.573
1985	7.446			10.282			17.728
1986	9.577			19.981			29.557
1987	9.292			20.538			29.829
Total	28.316 Mill FIM			52.373 Mill FIM			80.687 Mill FIM

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Finlande
(TEOSTO)

Chart of global gross amount (i.e. exclusive of tax and before deduction of costs) of home taping levy attributed to your Society (or received by your Society)

Please state below the amount of home taping levy distributed by your Society to the right owners (thereafter referred to as individual share) and the amount applied by your Society for socio-cultural purposes (thereafter referred to as collective share)

Individual share (due to Teosto's authors)

Year	AUDIO Tapes	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video
	MILL FIM			MILL FIM			MILL FIM
1983							
1984	0.440			0.100			0.540
1985	1.638			0.656			2.294
1986	2.107			1.275			3.382
1987	2.044			1.310			3.354
Total	6.229 Mill FIM			3.341 Mill FIM			9.570 Mill FIM

Collective share

Year	AUDIO Tapes	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video
	MILL FIM						
1983							
1984							
1985	0.100						
1986	0.450						
1987	0.300						
Total	0.850 Mill FIM						

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Finlande
(TEOSTO)

Chart of global gross amount (i.e. exclusive of tax and before deduction of costs) of home taping levy attributed to your Society (or received by your Society)

Please state below the amount of home taping levy distributed by your Society to the right owners (thereafter referred to as individual share) and the amount applied by your Society for socio-cultural purposes (thereafter referred to as collective share)

Individual share (due to Teosto's authors)

Year	AUDIO Tapes MILL FIM	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes MILL FIM	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video MILL FIM
1983							
1984	[illegible]			0.100			[illegible]
1985	[illegible]			[illegible]			[illegible]
1986	[illegible]			1.275			[illegible]
1987	[illegible]			1.310			[illegible]
Total	[illegible] Mill FIM			3.341 Mill FIM			9.570 Mill FIM

Collective share

Year	AUDIO Tapes MILL FIM	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video
1983							
1984							
1985	0.100						
1986	0.450						
1987	0.300						
Total	0.850 Mill FIM						

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France
(S C A M)

Tableau du montant global brut (hors taxe et avant imputation des frais) de la copie privée revenant aux auteurs

PART INDIVIDUELLE DONNANT LIEU A REPARTITION

	SONORE			AUDIOVISUELLE			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	audio + vidéo
1983							
1984							
1985							
1986	6 062			20 023			26 085
1987	531 880			2 530 828			3 062 708
1988	742 194			5 166 774			5 908 968
1er Sem.89							
	1 280 136			7 717 625			8 997 761

PART COLLECTIVE AFFECTEE A DES ACTIONS CULTURELLES

	SONORE			AUDIOVISUELLE			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	audio + vidéo
1983							
1984							
1985							
1986	1 212			16 066			17 278
1987	106 376			865 269			971 645
1988	148 411			1 379 973			1 528 384
1er Sem.89							
	255 999			2 261 308			2 517 307

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HUNGARY /ARTISJUS/

Chart of the global gross amount (i.e. exclusive of tax and before deduction of costs) royalty
Home taping royalty in your country

Please state below the amount of home taping royalty attributed to the right owners (hereinafter referred to as individual share) and the amount of home taping royalty applied for socio-cultural purposes (hereinafter referred to as collective share).

Individual share

Year	AUDIO Tapes MILL Ft	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes MILL Ft	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video MILL Ft
1983							
1984							
1985							
1986	24.310.980			6.209.579			30.520.559,-
1987	38.995.949			17.241.279			56.237.228,-
Total	63.306.929			23.450.858,-			86.757.787,-

Budapest, 1988. november 9.

Collective share

Year	AUDIO Tapes MILL FIM	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes MILL FIM	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video MILL FIM
1983							
1984							
1985							
1986							
1987							
Total							

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HUNGARY /ARTISJUS/

Chart of global gross account (i.e. exclusive of tax and before deduction of costs) of home taping royalty attributed to your Society (or received by your Society)

Please state below the account of home taping distributed by your Society to the right owners (thereafter referred to as individual share) and the account applied by your Society for socio-cultural purposes (thereafter referred to as collective share)

Individual share (due to authors and other owners of copyright - partly not yet distributed/

Year	AUDIO Tapes	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video
1983							
1984							
1985							
1986	12.155.490			4.346.705			16.502.195
1987	19.497.975			12.068.895			31.566.870
Total	31.653.465,-			16.415.600,-			48.069.065,-

Budapest, november 9.

Collective share

Year	AUDIO Tapes	AUDIO Recording Equipment	AUDIO Sub-total Tapes + Recording Equipment	VIDEO Tapes	VIDEO Recording Equipment	VIDEO Sub-total Tapes + Recording Equipment	Annual Total Audio + Video
	Mill. Ft						
1983							
1984							
1985							
1986							
1987							

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Chart of the global gross amount (i.e. exclusive of tax and before deduction of costs) of Home Taping levy in your country

Please state below the amount of home taping levy attributed to the right owners (hereinafter referred to as individual share) and the amount of home taping levy applied for socio-cultural purposes (hereinafter referred to as collective share).

Individual share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video
1983							
1984							
1985							
1986	1172.018	601.035	1773.053	2824.865	1412.432	4237.297	6.264.550
1987	2231.427	785.133	3016.560	4008.307	1239.683	5247.990	6.010.350
Total	3403.445	1386.168	4789.613	6833.172	2652.115	9485.287	14.274.900

Collective share

	AUDIO			VIDEO			Annual Total
Year	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Tapes	Recording Equipment	Sub-total Tapes + Recording Equipment	Audio + Video
1983							
1984							
1985							
1986	206.817	106.065	312.882	498.505	249.263	747.768	2.060.650
1987	383.781	138.553	522.334	707.348	218.768	926.116	1.448.450
Total	590.598	244.618	835.216	1205.853	468.031	1673.884	2.509.100

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France
(SDRM)

Tableau du montant global brut (i.e. hors taxe et avant deputation des frais) de la copie privée revenant aux auteurs SDRM

Veuillez préciser ci-après le montant des redevances effectées aux ayants droit Auteurs faisant l'objet d'une répartition et devant faire, ensuite, l'objet d'une répartition individuelle entre eux (que nous appellerons part individuelle) et le montant des redevances revenant aux auteurs et devant être affectées par eux à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Aud. + Vidéo
1983							
1984							
1985							
1986	404150			426495			830645
1987	35458720			53660115			89118835
1988	50471984			99143827			149615811
Total	86334854			153230437			239565291

Part collective

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983							
1984							
1985							
1986							
1987							
Total							

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France
(SACEM)

Tableau du montant global brut (i.e. hors taxe et avant imputation des frais) de la copie privée revenant aux auteurs sociétaires de la SACEM

Veuillez préciser ci-après le montant des redevances effectives aux ayants droit Auteurs faisant l'objet d'une répartition et devant faire, ensuite, l'objet d'une répartition individuelle entre eux (que nous appellerons part individuelle) et le montant des redevances revenant aux auteurs et devant être affectées par eux à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983							
1984							
1985							
1986	287502			140666			428168
1987	24966484			15952474			40918958
1988	35537323			25871881			61409204
total	60791309			41965021			102756330

Part collective

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassettes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1983							
1984							
1985							
1986	95834			46889			142723
1987	8322161			5317491			13639652
1988	11845775			8623960			20469735
total	20263770			13988340			34252110

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France

(SACD) (Voir également tableau SDRM)

Tableau du montant global brut (i.e. hors taxe et avant imputation des frais) de la copie privée affecté à votre Société (ou reçu par votre Société)

Veuillez préciser le montant réparti par votre Société aux ayants droit (que nous appellerons part individuelle) et le montant affecté par votre Société à des objectifs socio-culturels (que nous appellerons part collective)

Part individuelle

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassetes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1986	p.m.	-	-	p.m.	-	-	-
1987	1 095 845	-	1 095 845	15 352 003	-	15 352 003	16 947 653
1988			1 528 920	-	-	31 644 070	33 172 990
1989 (1er sem.)			944 000		-	18 180 880	19 124 880
Total	1 095 845		3 568 585	15 352 003		65 176 953	269 523

Part collective

	AUDIO			VIDEO			Total annuel
Année	Cassettes	Appareils	Sous-total Cassetes + Appareils	Cassettes	Appareils	Sous-total Cassettes + Appareils	Audio + Vidéo
1986	p.m.	-	p.m.	p.m.	-	-	-
1987	219 129(2)	-	219 129	5 284 003(1)	-	5 284 003	5 503 132
1988			509 640	-	-	10 548 023	11 057 663
1989 (1er sem.)			314 700	-	-	6 060 300	6 375 000
Total	219 129		1 043 469	5 284 003		21 892 326	22 935 795

(1) Y compris la part affectée à la Fondation Beaumarchais.
(2) Non comprise la part affectée à la FCDRS (prélevée au niveau de la SDRM).

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SATELLITE CD RADIO, INC.

Ter[illegible]rld Plaza
8[illegible]eet, NW
7th[illegible]
Washington, DC 20001

Tel: 202 408 0080
Fax: 202 408 0925

DEC 20 1990

Originally submitted 12/17/90

GENERAL COUNSEL
OF COPYRIGHT
JAN 09 1991
RECEIVED

Comment Letter
RM 90-6
No. 7

21 December 1990

Office of the Register of Copyrights
Copyright Office
James Madison Memorial Building
Room 407
First & Independence Avenue, SW
Washington, DC 20540

RE: RM 90-61; Digital Audio Broadcast and Cable Services; Copyright Office Study

Dear Sir/Madam:

Enclosed is a corrected version of the comments of CD Radio, Inc. which were filed Monday, December 17, 1990. The following makes corrections for typographical errors on page one (1) of the comments. Thank you.

Sincerely,

Martin Rothblatt

Martin Rothblatt
Chairman &CEO

CC: Dorothy Schrader
General Counsel, Copyright Office
Senator DeConcini

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Corrected version submitted 1-9-90

GENERAL COUNSEL
OF COPYRIGHT
DEC 17 1990
RECEIVED

Before the
Copyright Office
Washington, D.C. 20540

Comment Letter
RM 90-6
No. 7

IN THE MATTER OF)

Digital Audio	)	RM 90-6
Broadcast and	)	
Cable Services;	)	
Copyright Office	)	
Study	)	

COMMENTS OF CD RADIO INC.
IN RESPONSE TO THE NOTICE OF INQUIRY

CD Radio Inc. ("CD Radio") is the leading developer of integrated satellite and terrestrial delivery of digital audio radio services. CD Radio's technology team includes Stanford Telecom -- developer of the world's most advanced digital audio radio modulation system -- and Dolby Labs -- developer of the AC-2 digital source encoding technology. Over 100 companies, listener organizations, associations and public interest groups have supported approval of the CD Radio system in comments before the Federal Communications Commission (FCC).

CD Radio strongly believes there is no basis or justification for special regulation of digital audio radio services from the standpoint of protecting the rights of copyright owners. Indeed, any such regulation will actually hurt copyright owner interests by discouraging the development of a new radio distribution medium.

I. Digital Audio Broadcasting Services Will Not Prompt Average Listeners to Copy Copyrighted Works

Digital Audio Broadcasting Services are no more likely to be copied than works now broadcast on AM, FM, or TV. Of the dozens of listener organizations filing comments at the FCC, not one expressed an interest in copying digital audio broadcast transmissions (see, e.g. Comments of

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Delaware Farm Bureau, Gen. Dkt. No. 90-357, Oct. 13, 1990; Comments of Los Angeles Philharmonic Association, Gen. Dkt. No 90-357, Oct 10, 1990; Comments of South Dakota Trucking Association, Ibid.).

People want digital audio broadcasting services for the diversity and showcasing attributes that are unique to radio. When people want to hear a particular artist, they are vastly more likely to purchase a compact disc, as is the case today with non-digital radio. Indeed, digital audio radio is even less likely to be taped than is FM radio. This is due to several factors:

- digital audio tapes lose the track selection conveniences of compact discs and compact disc players, whereas cassette players offer few track selection conveniences;
- digital audio tape players are not at all widespread, and are unlikely to match cassette tape penetration for decades;
- digital audio broadcasting will not match the quality of digital audio storage media (tapes or CDs) due to inevitable interference and noise in the transmission process, especially to mobiles.

II. Copy of Works Transmitted Via Digital Audio Broadcasting Will Not Significantly Displace Sales of Copyrighted Works

Digital audio broadcasting will not displace sales of copyrighted works because broadcasting is not a substitute for stored media. On the contrary, if allowed to develop without regulatory burden, digital audio broadcasting will further stimulate sales of copyrighted works. Digital audio broadcasting provides the best possible "showcase" for copyrighted works recorded on records, tapes or compact discs. There is absolutely no evidence that listeners to digital audio broadcasts intend to record such broadcasts in lieu of purchasing copyrighted materials.

III. Copyright Owners and Their Representatives Have a Practical Ability to Negotiate with the Owners/Operators of Digital Audio Service Channels for Compensation for Transmission

Digital Audio Broadcasting via Satellite will be provided by channel purchasers. CD Radio will operate as a "private carrier" and simply maintain the satellite as a master transmission platform. The satellite in a digital audio radio service is no different in function than a radio transmitting tower shared by several FM stations. Copyright owners would negotiate compensation exactly as is done today for AM, FM and TV transmission.

IV. Royalties Should Not be Placed on Tapes or Recording Equipment if this Discriminates Against the Development of Digital Audio Radio

In general, CD Radio has no position regarding copyright royalties on DAT tapes or equipment. But, since such royalties do not exist for non-digital tape, CD Radio is concerned that such royalty provisions will be viewed negatively by the marketplace, with regard to the digital radio medium. Any discrimination against digital audio radio must be avoided to ensure healthy development of this vital new medium.

V. CD Radio Is Vigorously Opposed to Forced Scrambling of Digital Audio Broadcasts

CD Radio believes enforced scrambling of copyrighted works would be unfair, impractical, counter-productive and unconstitutional. Enforced scrambling would unfairly discriminate against digital audio radio service providers, severely handicapping a free, over-the-air service. Enforced scrambling would also be impractical insofar as royalties would have to be collected from millions of discrete listeners, rather than from broadcasters as is the case today. It is also impractical because every scrambling system invented is soon broken by black marketeers.

CD Radio further believes than enforced scrambling is counter-productive to copyright owners as it will kill off digital audio radio in its infancy -- otherwise, digital audio radio could provide a major new source of

copyright royalties by increasing listenership and audio "showcases" for copyrighted work.

Finally, CD Radio firmly believes enforced scrambling of intentionally free, over-the-air broadcasts violates the First Amendment, as well as the Due Process and Equal Protection clauses of the U.S. Constitution. Internationally, enforced scrambling violates the various U.N. documents and treaties protecting human rights, including the right to seek and impart information.

VI. The CD Radio System is a Highly Advanced Free, Over-the-Air System.

The CD Radio system does not use encryption. Pre-recorded signals are digitally modulated using Dolby AC-2 encoding and are transmitted in a highly efficient waveform developed by Stanford Telecom. CD Radio compresses the digital signals in a 6:1 ratio to conserve bandwidth. CD Radio has no plans or bandwidth for transmitting digital subcode information.

VII. CD Radio Anticipates Reaching 10 million Listeners by the Year 2001, Following 1994 Start-Up

CD Radio currently has no subscribers but has signed option agreements for two of its satellite channels. CD Radio anticipates FCC approval in early 1991 and service start-up in 1994. WARC frequency allocation is not necessary for the CD Radio service; only Mexican-Canadian coordination is required. After six years, 10 million listeners are anticipated.

All service offerings will be market determined. Evidence to date indicates classical, contemporary and special interest formats will dominate the digital audio radio system. All copyright arrangements are the responsibility of the channel purchasers. CD Radio is a passive carrier.

SUMMARY

CD Radio believes the key interest of the copyright owners is to avoid harmful interference with the development of the new digital audio radio service. It is critical to avoid any regulation of digital radio on the false

premise that copying of digital broadcasts is more likely than copying non-digital broadcasts. Any copying of digital broadcasters will be de minimis.

In no event should scrambling obligations be imposed on digital audio radio, nor should any other discriminatory rules be adopted.

Respectfully Submitted,

Martin Rothblatt

CD Radio Inc.
Martin Rothblatt
Chairman & CEO

GENERAL COUNSEL
OF COPYRIGHT
DEC 17 1990
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Comment Letter
RM 90-6
No. 8

Before the
LIBRARY OF CONGRESS, COPYRIGHT OFFICE
Washington, D.C.

In the Matter of	)	
	)	
Digital Audio Broadcast	)	Docket No. RM 90-61
and Cable Services;	)	
Copyright Office Study	)	

COMMENTS OF CBS INC.

CBS Inc. ("CBS") submits these comments in response to a Notice of Inquiry ("Notice") issued by the Copyright Office in the above docket. 55 Fed. Reg. 42916 (October 24, 1990). The Notice raises various questions concerning digital audio broadcasting and home taping of digital audio transmissions, the impact of such taping, and its appropriate treatment under copyright law. It solicits comment on a number of issues and proposals, including the imposition of a tax or royalty on digital recording machines or tapes, and asks, inter alia, whether digital audio broadcasters should "be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for the possible copying of copyrighted works." Id. at 42917.

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CBS is owner and operator of 19 licensed radio stations and two radio networks which serve affiliated stations across the country. We submit these comments to voice our strong opposition to any proposal that would prevent local broadcasters from offering digital sound unless they scrambled their transmissions.

Free, over-the-air, locally based broadcasting is the cornerstone of United States communications policy. Indeed, the primary purpose of the Communications Act was to establish a system of universal free broadcast service through the "fair, efficient, and equitable distribution" of broadcast licenses "among the several states and communities." 47 U.S.C. § 307(b). It is a system that has served the public well, providing free news, information, entertainment, and sports programming geared to the tastes, interests, and needs of the local community. With its great diversity of programs, its extensive coverage of local news, weather, traffic, and breaking events, and its reception throughout the home, in the car, at the office, and at play, radio continues to fill a vital role in the communications structure and the everyday lives of millions of listeners.

Digital audio represents an exciting new opportunity for broadcasters and the public, promising a substantial

improvement in sound quality and reception characteristics. It is certainly our hope that technical and administrative developments enable CBS and other broadcasters to provide, as early as possible, free, over-the-air digital transmissions to our local audiences. Indeed, as we have emphasized in comments to the Federal Communications Commission,[1/] the continued viability of our system of free, over-the-air, locally licensed radio depends on broadcasters' being accorded the opportunity to broadcast on a digital basis. If unable to compete digitally with nonbroadcast audio sources, local radio would be placed at a severe disadvantage and ultimately doomed to technological obsolescence.

The Notice's encryption proposal would appear to restrict digital service to broadcasters who scramble their transmissions and operate on a subscriber or pay-per-listen basis. Broadcasters who wish to continue freely available, non-addressable broadcasts to the general public would be prohibited from transmitting digitally.

1/ See Comments of CBS in FCC Docket No. 90-357 (Digital Audio Broadcasting, Notice of Inquiry) and in FCC Docket No. 49/50-DSS-P/LA-90 (Application of Satellite CD Radio, Inc. for Digital Audio Radio Service Satellite System).

We strongly oppose such a plan. As discussed above, a robust, diverse system of free, generally available local radio service is of enormous benefit to the listening public. Digital quality should not be confined to paying customers, nor denied to broadcasters who serve the general public with free broadcasts. Free radio should not be relegated to second-class technological status.

We have no wish in these comments to enter the long-standing debate about home taping, except to note that the recording of radio broadcasts would appear to constitute a relatively small percentage of taping activity,[2/] and that the economic impact of even this limited amount of taping is highly uncertain.[3/] We would also note that the vast preponderence of radio reception involves no taping.[4/] In any event, even

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2/ In its 1989 study of home taping, the Office of Technology Assessment found that only 27 percent of respondents to its survey had taped music from radio or television sources (including cable) within the past year. Copyright and Home Copying (1989) at 152. Unfortunately, the survey did not isolate the number taping from radio, but we would assume that figure to be substantially lower.

3/ See generally id. at 169-207.

4/ Indeed, we believe that a great majority of radio listening occurs in circumstances not generally conducive to taping, such as while driving or on

(Continued on Page 5)

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if home taping is deemed to cause such severe harm to copyright holders to merit restrictive or remedial action, such action need not and should not involve encryption, subscription, or any other restraint or limitation on digital radio broadcasts.

For example, the Serial Copy Management System (SCMS) proposal agreed to last year by the recording industry and hardware manufacturers would place technical limits on successive digital copying, but these limits would inhere in the digital audio tape recorder and impose no requirements or restrictions on broadcast transmission or reception.[5/]

4/(Continued from Page 4)
portable or stand-alone radios not equipped with or connected to recording apparatus.

5/ The SCMS proposal would permit the making of a single digital copy from a digital source, but block any further digital copying from that copy. Legislation which would have enacted the SCMS proposal into federal law was introduced during the last session of Congress. See H.R. 4096, 101st Cong., 2d Sess. (1990). As the bill expressly recognized, operation of the SCMS system would not require that digital broadcasters include digital subcode information in their transmissions. Id. at § 3(e)("Any person who transmits or otherwise communicates to the public any sound recording in digital format shall not be required under this Act to transmit or otherwise communicate the information relating to the copyright status of the sound recording...") Whether such subcode material could be readily embedded within the broadcast digital data

(Continued on Page 6)

Other proposals have called for the imposition of taxes or royalties on the sale of digital audio tape recorders or cassettes. Again, we do not express a view on the merits of any of these particular proposals; we note them only to point out that measures which do not place requirements or restrictions on broadcasters would appear to be adequate to satisfy the concerns and needs of the recording industry, performers, and copyright holders.

In sum, we strongly oppose the imposition of any requirements which would prevent local broadcasters from transmitting digital sound free of charge to the general public, such as a requirement that such services be scrambled and made available only on a subscription or pay-per-listen basis. If it is concluded that limits or taxes should be placed on the copying of digitally transmitted materials, this can be accomplished by measures related directly to the copying itself, rather than through overreaching restrictions on transmissions or reception. Whatever the merits of the

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5/(Continued from Page 5)
stream would depend on a number of factors, including the compression algorithm ultimately employed for digital broadcasts. We would certainly oppose any requirement that additional scarce spectrum space, such as subcarrier space, be allocated for this purpose.

arguments against home taping, they do not justify restraining local broadcasters from providing the best possible sound transmissions, free of charge, to their listening audiences.[6/]

Respectfully submitted,

CBS INC.

By _____
Howard F. Jaeckel

By _____
John W. Zucker

51 West 52 Street
New York, New York 10019

Its Attorneys

December 17, 1990

6/ The Notice's request for information regarding proposed digital broadcast systems is premature at this point, with the FCC still at any early stage in its consideration of basic choices regarding spectrum allocation, licensing procedures, and technical standards for digital transmissions.

GENERAL COUNSEL
OF COPYRIGHT
DEC 17 1990
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Comment Letter
RM 90-6
No. 9

BEFORE THE UNITED STATES COPYRIGHT OFFICE,
LIBRARY OF CONGRESS

Notice of Inquiry; Digital Audio Broadcast and Cable Services; Copyright Office Study	Docket No. RM 90-6

COMMENTS OF THE NATIONAL ASSOCIATION
OF RECORDING MERCHANDISERS

On behalf of the National Association of Recording Merchandisers ("NARM"), we submit the following comments in response to the Copyright Office's Notice of Inquiry regarding digital audio broadcast ("DAB") and cable services, issued in response to a congressional request on this matter.

NARM is the national trade association that represents the vast majority of sound recording retailers and distributors across the nation. NARM's members have a vital interest in new technology that affects the home entertainment industry. The capacity to deliver digital audio programming, whether transmitted by satellite, terrestrial, or cable television systems, is an example of such a new technology.

NARM typically supports the introduction of new technology because it satisfies the desire of the public to obtain the widest range and highest quality of sound recordings. NARM neither opposes nor favors the introduction of DAB. The presence of DAB by itself does not increase the likelihood of unlawful copying of recorded works by

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listeners. No new technological advance, however, ever occurs in a vacuum. Consequently, NARM respectfully submits that in considering the potential impact of DAB on the issues raised in the Notice of Inquiry published in the October 24, 1990, issue of the Federal Register, the Copyright Office should consider the impact of DAB in conjunction with the presence of enhanced recording technologies such as Digital Audio Tape ("DAT") and DAT recorders.

With these concerns in mind, NARM respectfully requests that the Copyright Office consider the following points when formulating its response to Congress:

1. Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works?

Although the presence of DAB alone would not contribute to an increase in the average listener's potential unauthorized copying of copyrighted works, the introduction of DAB, coupled with the unrestricted copying capabilities of digital recording equipment such as DAT and DAT recorders, indicates that, in view of the possible cost considerations, the average listener would be more likely to copy copyrighted audio works digitally broadcast to the home via DAB technology. The near-perfect quality of sound broadcast via DAB unquestionably increases the desirability of such unauthorized copying, particularly when such copying is achieved through the use of digital recording hardware and tapes. Audio recordings achieved through the use of such

digital equipment (including DAT and DAT recorders) would no longer be muddled with static or other denigrating factors, which is the case with existing AM and FM radio and television transmissions. Such tapes would have a superior sound quality which more nearly approximates the clarity currently achieved through compact discs. Thus, the superior sound quality of DAB, coupled with the digital recording capabilities of DAT and DAT recorders, as well as cost factors, would be likely to increase home copying to some extent.

2. Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, or compact discs?

It is impossible to quantify the extent to which sales of copyrighted works would be adversely affected by the introduction of DAB, when such introduction is coupled with digital audio home recording technologies such as DAT and DAT recorders. In general, NARM does not believe that a major increase in taping off the air would result from the introduction of DAB.

The current distribution system for sale of copyrighted audio works and sound recordings to the general public through retail merchandisers serves several important goals, including increased public access to the works of lesser-known or less commercially viable artists. NARM members do not limit their inventory to currently popular "favorites" (i.e., Top 40 or the like). To the contrary,

NARM's members offer a wide range of choices which extend far beyond current hits.

Retail stores presently are, and should remain, the primary source for public access to the widest and most diverse range of recorded copyrighted audio works, permitting the public to make its own choice of the copyrighted music. Any technology such as DAB (provided digital audio recording facilities are available) which threatens to undermine sales of copyrighted works, thereby threatening the viability of the audio retailer, should be carefully monitored to permit continued access by the public to the broadest range of copyrighted works. In the event there is a marked decrease in sales of copyrighted works following the introduction of DAB, the matter should be further reviewed.

3. Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself to be distributed among copyright claimants? If so, who would be responsible for administering this process?

At this time, NARM takes no position on the imposition of a royalty charge on recording material, such as blank tapes, or on digital recording equipment. The Copyright Law seeks to balance the need to reward the creator of the copyrighted work (in order to encourage continued creativity) and public access to that work. Consequently, any decision to impose a royalty system should be based on a complete and careful study of the issues involved to avoid any unacceptable alteration of this balance.

NARM reserves its comments on the remaining questions posed in the Notice of Inquiry and further reserves the right to file additional comments after review of other comments filed in response to the Notice of Inquiry.

Respectfully submitted,

Charles B. Ruttenberg

Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-5339
Telephone: (202) 857-6082

Counsel for National Association
of Recording Merchandisers

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Before the
Copyright Office
Library of Congress

Comment Letter
RM 90-6
No. 10

In the matter of	)	
	)	
Notice of Inquiry Re.	)	
Digital Audio Broadcast and	)	Dkt. No. RM 90-6
Cable Services Copyright Office	)	
Study	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1/] hereby submits its response to the Copyright Office's Notice of Inquiry[2/] ("NOI") in the above-captioned proceeding.

In its NOI, the Copyright Office seeks to "examine the development of new digital audio broadcast and cable services and the effects implementation of such services may have [on] performers and copyright owners of copyrightable works under the Copyright Act."[3/] Specifically, comment is sought on whether any possible adverse affects on copyright owners may result from the delivery of digital audio programming ("DAP") via three discrete types of transmission mechanisms: satellite systems, terrestrial systems, and cable television systems. If such adverse affects are anticipated, comment is sought on possible remedial measures which might be adopted.

1/ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

2/ Digital Audio Broadcast and Cable Services; Copyright Office Study, Dkt. No. RM 90-6, 55 Fed. Reg. 42, 916 (Oct. 24, 1990).

3/ Id. at 42, 916 (emphasis added).

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Because NAB represents the interests of entities that will potentially deliver DAP free to listeners via terrestrial systems, these comments will focus on the copyright implications of digital audio technology as it might be applied by over-the-air broadcasters to enhance the quality of their signals provided free to all listeners they are licensed to serve. In this context, NAB's positions are as follows:

1) At this point in time there is virtually no way accurately to access what unique impact, if any, the advent of digital audio technology will have on the interests of the owners of copyrighted material which might be transmitted by broadcasters. The Federal Communications Commission is only at the preliminary stages of addressing such fundamental issues as what, if any, spectrum will be allocated for the delivery of digital audio signals, who will be eligible for such spectrum, and a host of technical performance and coverage issues. Neither the equipment necessary for broadcasters to transmit digital audio signals nor the equipment necessary to receive such signals is commercially available. Further, there is no current accurate assessment of the costs and economic viability of implementing such technology. Under these circumstances, it would be precipitous and premature for the Copyright Office to attempt to make recommendations, or for the Congress to consider amending the Copyright Act in any way relating to the works of copyright owners digitally transmitted by over the air broadcasters. At a minimum, the consideration of such recommendations must await empirical studies of taping habits conducted after the implementation of digital audio broadcasting ("DAB").

2) Congress has determined that home taping of prerecorded music from broadcasts for private use without compensating record producers and performers is legitimate and is sound public policy. Those who would seek to overturn this determination bear a heavy burden which cannot be met with unsupported speculation as

to possible adverse impacts on the recording industry that may or may not result from the advent of DAB.

3) The most current available data and analyses on the extent to which the copying of musical works is affecting the interests of the copyright owners, contained in a study conducted by the Office of Technology Assessment,[4/] do not provide justification for amending current copyright laws that would impose a new royalty on free over-the-air broadcasters employing DAB technology.

4) Assuming arguendo any adjustments are required in the compensation scheme to the copyright owners of sound recordings and/or performers resulting from DAB related home taping, they should be narrowly drawn and crafted so that those who directly benefit from taping in connection with the use of such advanced technology compensate those who are directly harmed by it. Only a relatively modest amount of prerecorded music is taped from over-the-air sources. Moreover, such taping rarely involves taping entire albums, and such tapes are usually used to shift the time and place of that which is taped. Accordingly, the assessment of a home taping penalty on broadcasters using DAB technology would impose on them a harsh new burden for which they would receive little, if any, benefit. Such an assessment would merely create a windfall for the recipients of such royalties.

5) A less drastic and more focused and meaningful response than broadcaster royalties to concerns over the potential adverse effects of taping of music off-the-air would be the use of technological mechanisms such as copy codes, which could be used to ensure reasonable limitations on the duplication of copyrighted works. The use of

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4/ U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges The Law, OTA-CIT-422 (Washington, D.C., U.S. Govt. Printing Office, October 1989) [hereinafter "OTA Study"].

such mechanisms do not, and should not, require DAB broadcasters to transmit subcode information.

6) NAB is strongly and unalterably opposed to any proposal which would require digital audio broadcasters to scramble their signals such that listeners would be forced to pay to receive such signals and/or acquire special receiving equipment.

I. Any Current Assessment of the Impact Over-The-Air DAB Will Have On Copyright Owners Would be Highly Speculative and Premature.

In its Notice of Inquiry[5/] into the potential establishment and regulation of proposed new digital audio radio services released August 21 of this year, the Federal Communications Commission expressed its intention "to begin to focus public attention on this potentially important medium."[6/] NAB respectfully submits that it is, and for the near term will remain, impossible for the Copyright Office or for Congress to assess what unique impact, if any, the advent of DAB will have on the interests of the owners of copyrighted material when the FCC is just beginning to focus on how, or even if, DAB will be implemented in this country.

The FCC's Notice raises a host of as yet unanswered technical, legal, and policy issues relating to DAB. These include such fundamental issues as: 1) how and where to accommodate the spectrum needs of DAB; 2) whether DAB should be provided by satellite and/or terrestrially; 3) how providers of DAB should be chosen and regulated; 4) what coverage areas should be allocated; 4) what costs will be involved for what incremental increases in sound quality; 5) what technical standards should be

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5/ See Notice of Inquiry in Gen. Docket 90-357, 5 FCC Rcd 5237 (1990).

6/ Id. at 5237 (emphasis supplied).

adopted; and 6) what effect the implementation of DAB would have on the existing system of locally based broadcasting.

Initial comments in the FCC's Notice were filed November 13, 1990. Reply Comments are scheduled for January 7, 1991. Following an evaluation of these initial comments and reply comments, the FCC would have to initiate and complete a full rulemaking proceeding, during which the public would have another set of opportunities to file comments and reply comments, before any final rules and policies governing DAB could be adopted. Such rules could, of course, be subject to court challenge.

Additionally, the FCC's timetable in any such domestic inquiry/rule making process would be governed, at least in part, by the international timetable. In this regard, the FCC is engaged in United States preparations for the 1992 World Administrative Radio Conference ("WARC"). The Commission has begun an inquiry proceeding addressing a wide range of preparatory issues, of which one is digital audio broadcasting.[1/] Although the Commission has been presented with several petitions and applications urging FCC authorization of either experimental digital broadcasting operation or permanent authority, it appears that only the former is likely to be given FCC approval, pending the adoption of final domestic rules and the completion of this country's preparation for the WARC.

Thus, it appears that 1992 would be the earliest time that the Commission would be expected to establish rules under which a domestic digital audio broadcasting system would be inaugurated. Moreover, actual licensing of such facilities likely would not be accomplished until the following year. Even more importantly, and due to the fact that not until 1992-3 (under the most optimistic timetable) would the Commission

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1/ See Second Notice of Inquiry in Gen. Docket No. 89-554, 5 FCC Rcd 6046 (1990).

take these rulemaking and authorization steps, the public sale of digital broadcasting receiving equipment would not even begin until the end of this time frame, with several years additional passage before transmission and reception in the digital mode could become a significant factor in domestic, over-the-air broadcasting.

Because the timetable for domestic inauguration of digital broadcasting, discussed supra, looks to the second half of the 90s as the time where DAB might have any perceptible impact on over-the-air broadcasting, any effort now to calculate or predict the impact of such a service on copyright owners would be both premature and highly speculative.

Beyond the issue of "earliest possible" initiation of DAB service, there remains the overriding issue of whether there will be a significant public demand for such a service, let alone whether there would be any significant demand to record programs broadcast over such a digital service and what effects such demand might or might not have on copyright owners. NAB submits that meaningful responses to the questions posed by the instant Copyright Office proceeding can only be provided following an empirical study, such as the recent OTA Study, conducted after DAB is "up and running."

II. Those Who Would Overturn The Congressionally Sanctioned Practice of Home Taping of Prerecorded Music From Broadcasts For Private Use Bear A Heavy Burden.

The legislative history of the Sound Recording Act of 1971 reflects that Congress expressly determined that home taping of prerecorded music from over-the-air broadcasts for private use without the need to compensate record producers and performers was legitimate and was sound public policy.

> Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no

> purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical composition over the past 20 years.

H.R. Rep. No. 92-487 at 7 (1971).

As Congressman Kastenmeier once observed: "the proponents of change [to create a new copyright interest] should have the burden of showing that a meritorious public purpose is served by the proposed congressional action.[8/] As part of this burden, Congressman Kastenmeier believed that the proponent of change "should present an honest analysis of all the costs and benefits of the groups that will bear the adverse consequences of the proposal and explain why they should bear those losses. The argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirement of the intellectual property clause. . ."[9/]

Those who would impose harsh new financial burdens on broadcasters relating to home taping face a particularly heavy burden. First, they must show that home taping from off-the-air sources justifies the imposition of new royalties to benefit record producers. Second, they must show that if such royalties are to be imposed, it would be fair to impose them on broadcasters. As we show below, it would be impossible for the record industry to sustain that burden at this time.

8/ Kastenmeier and Remington, "The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?" 70 Minn. L. Rev. 417, 440-42 (1985)("SCPA Article"); see Testimony of Professor David Lange, Copyright and Technological Change: Hearings Before the Subcommittee on Court, Civil Liberties, and the Administration of Justice of the House Judiciary Comm. 98th Cong., 1st Sess. 60-66. ("It is reasonable to require the proponents of a new interest to bear the burden of showing why any intrusion into the public domain ought to be allowed -- and equally reasonable to presume that the public domain will be protected until that burden has been discharged." Id. at 65-66.

9/ SCPA Article at 440-442.

III. Current OTA Data And Analyses On Over-The-Air Home Taping Fails To Provide A Justification For Consideration Of Home Taping Royalties On Digital Audio Broadcasters.

The most current available data contained in the 1989 OTA study on the extent to which the copying of prerecorded music provided by radio and television is affecting the interests of copyright owners does not provide a justification for amending current copyright law to impose additional royalties on broadcasters that may choose to convert from analog to digital. The OTA sponsored analyses of this data is, at best ambiguous, and also provides no basis on which to impose home taping royalties on DAB broadcasters.

The first step in OTA's exhaustive study on consumer home audio taping consisted of a large-scale telephone survey designed primarily to examine audio home taping and copying behavior in the United States; a limited investigation of home video taping also was included in the study.

OTA's telephone survey was conducted in the fall of 1988 and resulted in completed interviews with a nationally representative sample of 1,501 persons ages 10 years and older. The sampling selection procedure produced data that was statistically projectable to the entire population. Findings from the survey shed light on a range of home taping issues. Among other items, the survey sought information on the frequency of home audio taping, specifically of music, reasons for these tapings, and the original sources for music tapes made by individuals at home.

With specific reference to copying of broadcast transmitted musical works, the OTA study reveals that: a) the vast majority of people who copy prerecorded music

make copies from sources other than radio or television;[10] b) "the tapings of music from radio and television broadcasts were almost exclusively non-albums."[11] Indeed, only 5 percent of those surveyed had taped an album off the air within the preceding 12 months;[12] c) by far the most often cited reason for taping was "to permit the taper to shift a recording he owned to other playback equipment . . . so that they can play them in their car, Walkman, or elsewhere;"[13] d) while home taping from all sources displaced some sales of prerecorded products, home taping was also found to have a stimulative effect on sales by helping to advertise songs and performers;[14] e) playback technology, rather than copying technology, had driven home taping,[15] hence DAB, which would enhance the quality of that which could be taped as opposed to enhancing the ability to play back, could not be anticipated to increase home taping; f) people make little discrimination in the grade of blank tape they use; indeed only about one-third of music tapers even know what grade of tape they use.[16]

10/ Only 27% of those surveyed taped music from radio and television in the last year. OTA Study at p. 152, Tables 5-9. No breakout was included as to how much taping was from cable programming as opposed to that of over-the-air television and radio.

11/ OTA Study at p. 155.

12/ A total of 1,501 individuals were interviewed in the OTA survey. Of that total, 338 had made an audiotape of music from radio or television in the previous 12 months. Of that subgroup, 23% (or 78 individuals) had taped an album within the preceding year. Id. at 269, Table 6-1. These 78 individuals amount to 5.2% of the total population.

13/ OTA Study at p. 157 (emphasis supplied).

14/ OTA Study at pp. 157-159. OTA estimated that at least 78 percent of home taping is prerecorded music displaced no sales and that the actual figure may be higher. Id. at p. 158.

15/ OTA Study at p. 161.

16/ OTA Study at p. 160.

Such lack of sophistication or concern about obtaining the absolute maximum available sound quality, when considered together with the relatively small amount of album taping that is done of music broadcast over the air, strongly suggests that the availability of DAB will not appreciably increase the incidents of such taping,[17] and that even if it does, the adverse impact on copyright owners will be minimal.

As part of the OTA Study, three independent economic analyses were commissioned to evaluate the survey data. The first analysis, by Michael Katz, attempted to develop a theoretical framework for analyzing the economic effects of home copying. The OTA concluded with respect to the Katz analysis that "[s]ome of the most crucial factors [used in the analysis] are very difficult to measure and several alternative assumptions may be equally plausible -- for example, the extent to which consumers would increase purchases of prerecorded music, absent home taping. Thus, the same survey information can support widely different estimates, yet this type of uncertainty is unlikely to be reduced by more data" (emphasis in the original).[18]

The second analysis, by William Johnson, which sought to examine some of the factors that influence home taping and purchasing originals, was "unable to detect statistically significant estimates of the extent that copies substitute for originals."[19]

The third analysis, by Fred Mannering, used survey data on consumers' choice of format for listening to music to estimate econometric models of consumers'

17/ Logic would suggest that a major reason there is so little taping of pre-recorded music off-the-air is the time, inconvenience, and advance planning required to do so. There is no reason to believe that the advent of DAB will affect these disincentives to tape off-the-air.

18/ OTA study at pp. 12-13.

19/ Id. at p. 13.

choice between purchasing recorded music and taping it. The OTA's conclusions from the Mannering analysis were that: 1) a ban on home taping would result in "a consistent loss in consumers' economic welfare and in society's net economic welfare;" and 2) "there is no single estimate of the dollar values gained or lost as the result of a taping ban."[20/]

A fair reading of the conclusions drawn from these analyses is that they are, at best, ambiguous and certainly provide no justification to consider imposing new royalties on broadcasters choosing to engage in DAB.

IV. Any Necessary Adjustments In Compensation To Copyright Owners Of Sound Recordings Resulting From DAB Related Home Taping Should Not Be Assessed Against Broadcasters.

As we have just discussed, the amount of prerecorded music that is taped from over-the-air sources is modest, and taping of entire albums off the air is very rare. Based on the OTA Study and other available evidence, it is doubtful that the introduction of DAB would lead to a material change in these patterns, and it is certainly too soon to make that judgment now. But even assuming arguendo that some adjustments were required to compensate record producers and/or performers for home taping activities as a result of DAB, it would be grossly unfair to impose new financial burdens on broadcasters, who derive no meaningful economic benefit from it. Indeed, to the extent that home taping provides consumers with additional alternatives to radio and television fare, home taping may well result in a net harm to broadcasters. Accordingly, any such adjustments should be narrowly drawn and crafted so that those who economically benefit from taping in connection with the use of advanced DAB technology compensate those who are harmed by it.

20/ Id. at pp. 13-14.

a. The OTA survey data referenced above shows that only a small fraction of total radio and television audiences listen or watch for the purpose of taping. Indeed, approximately 53% of all radio listening is not even done in the home,[21/] where most taping presumably would occur. Furthermore, those who do tape music off of the radio or television probably do not listen to the commercials and/or delete the commercials out of that which is taped. Moreover, the OTA survey indicates that the tapes made by home tapers appear to be used by them to provide musical entertainment at other times and in other places in lieu of listening to music provided by broadcasters. Accordingly, broadcasters receive very little, if any, benefit from listeners who tape, and may even be harmed by it.

b. The primary interest of broadcasters in DAB at this time and the reason they would invest in DAB technology is to remain competitive with alternative sources of audio entertainment such as digital audio cable and satellite services. In other words, broadcasters would invest in DAB primarily as a defensive strategy and do not necessarily foresee that such investment would increase listenership and/or advertising revenue.[22/] Indeed, any success of cable or satellite-based digital audio services will

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21/ See Radio Facts for Advertisers, 1990, Radio Advertising Bureau, Inc., New York, NY.

22/ For example, a recent study on Americans' use of time concluded that: "Technological improvements [such as the VCR] appear to affect the quality of television viewing more than the quantity. Americans spent roughly the same amount of time watching TV in 1985 as they did in 1975." See, Robinson, John P., American Demographics, Ithaca, New York, September 1990, reprinted in NAB News, December 3, 1990 at 17.

likely come at the expense of local broadcast stations.[23/] Accordingly, to assess a home taping penalty on broadcasters that adopt DAB technology would unfairly impose new burdens for which broadcasters would obtain little or no economic benefits.

c. The radio industry already pays an estimated $125 million to $153 million annually in royalties to music composers and publishers for the music it publicly performs.[24/] The television industry pays another $60 million.[25/] About 1 in 20 licensed AM stations -- about five percent of all AMs -- are listed as being "dark."[26/] In 1989, the profit margin of the average radio station was a modest 5.35 percent, down from 6.9 percent in 1988. In separate categories, the average profit margin for FM stations was 5.1 percent; for AM/FM stations the average profit margin was 3.9 percent, and for AM daytimers the average profit margin was a negative 5.4 percent.[27/] Given this overall declining profit picture, the imposition of home taping fees on radio stations could have a considerable negative

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23/ A pilot study of three markets considering in-home listening of digital cable radio suggested that over-the-air radio is used less by 60 percent of the surveyed households after cable radio was introduced. See "Field Testing Program," Cable Marketing, June 1989 at p. 30; "Cable TV To See If Cable Radio Means Sweet Music For Revenue," Wall Street Journal, November 6, 1990 at B10 ("Just as cable television has cut into viewership share of the network TV stations, those homes that take digital audio could cut into the listenership for radio stations.")

24/ The royalties paid by commercial establishments that retransmit the signals of broadcast stations generate an estimated additional millions of dollars for the music industry.

25/ NAB News, December 3, 1990 at 15.

26/ Broadcasting, October 1, 1990.

27/ 1990 NAB/BCFM Radio Financial Report, NAB, Washington, D.C.

impact particularly on many AM stations. Indeed, the consequences of such fees might be to cause more stations to go dark, thereby reducing the current level of royalties paid to composers and publishers, and reducing the revenues of RIAA members resulting from a reduction in the number of broadcast outlets through which the public is exposed to their product.[28/]

d. The imposition of a home taping penalty on broadcasters choosing to employ DAB technology would result in an unconscionable windfall for the recording industry. Listener exposure to performing artists and/or music recordings on radio (or television), and their subsequent purchases of now familiar recorded music has been critical to the long-standing, and mutually beneficial, relationship between the radio and recording industries in the United States. Notably, according to OTA, a large majority (79%) of those who purchase prerecorded releases (cassettes, CDs, 45's, vinyl albums, or music video laser discs) of particular recording artists already had heard the performer or specific musical recording played either on the radio or television.[29/] This suggests fairly clearly that the synergistic and stimulative effects of radio (and television) airplay of prerecorded releases on ensuing consumer market sales is of valued, tangible benefit to recording artists and record producers/distributors. In this regard, it is significant to note that the estimated dollar amount for manufacturers' annual unit shipments of

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28/ Another adverse consequence would be to threaten the ability of many stations to continue to fulfill their public service obligations to their communities.

29/ OTA Study, Table 8-11 (in the past year).

prerecorded music for 1990 is $8.02 billion.[30/] Furthermore, most recording companies have music publishing subsidiaries which already receive royalties from broadcasters for public performance and synchronization rights.[31/] Regular airplay of sound recordings also increases the popular appeal of recording artists and performers, resulting in the attraction of larger crowds at concerts and nightclub appearances. The benefits of airplay perhaps are best illustrated by the usual recording industry practice of providing stations with sample free copies of sound recordings. Without the extensive airplay of sound recordings, record producers and distributors would suffer loss of sales and other related revenues and be forced to pay for additional advertising of their product. The benefits of airplay to recording companies and artists are, thus, substantial, and to require broadcasters to pay for the right to perform sound recordings would be inequitable and excessive.[32/]

e. A more equitable proposal than imposing a home taping penalty on broadcasters would be the use of a debit or credit card system. This proposal, advanced by Ralph Oman, Register of Copyrights, in a recent

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30/ U.S. Industrial Outlook, 1990, U.S. Dept. of Commerce, pp. 47-3.

31/ OTA study, p. 51-52. Thorn-EMI and Warner/Chappell alone own the rights to over one million songs. Id. at p. 51 n. 35.

32/ The potential primary beneficiaries, in economic terms, of the promulgation of DAB would appear to be the equipment and tape manufacturers. While NAB certainly does not concede that RIAA or other copyright owner groups have, or at this point in time can, demonstrate the justification for a new home taping royalty, we note that they apparently are currently involved in negotiations with equipment and tape manufacturers regarding a plan that would impose a royalty on digital hardware and blank digital audio tape. See "Silence on Taping Fees," Television Digest, Nov. 5, 1990 at 16.

report to the American Bar Association,[33/] would use digital technology to track and pay for copying by home tapers and would have the salutary benefit of not imposing a royalty for noninfringing uses.

V. Adoption of a Copycode System Embedded In Blank Tapes and Recording Equipment Is An Alternative Preferable To Home Taping Royalties.

NAB submits that adoption of a copycode mechanism such as the Serial Copy Management System ("SCMS"), which was incorporated in a recording industry/receiver manufacturer industry compromise that was part of legislation recently considered by Congress,[34/] would be a far preferable solution to the home taping issue than the imposition of a home taping penalty on broadcasters. Such a solution would more effectively, efficiently, and directly focus on home taping itself, without unfairly burdening an industry -- broadcasting -- which gains no benefit from home taping.

The adoption of such a scheme need not and should include a requirement that broadcasters using DAB transmit all digital subcode information that may be embodied on prerecorded works. Cogent and persuasive reasons why such a requirement would be unwise and unnecessary were included in the Comments of the Home Recording Rights Coalition filed recently with the FCC, the relevant portion of which is attached hereto as Appendix A.[35/]

33/ See "Report From The Copyright Office To The ABA Annual Meeting," PTC Newsletter, Volume 9, No. 1, Fall 1990 at 10, 31.

34/ See, e.g. S.2358 and companion bill H.R. 4096, each entitled "Digital Tape Recorder Act of 1990." These bills were pending at the conclusion of the 101st Congress.

35/ Comments of The Home Recording Rights Coalition in Gen. Dkt. No. 90-357 filed November 13, 1990.

An additional reason why a requirement that all such subcode information be transmitted by digital audio broadcasters is undesirable is that it would be spectrum inefficient and could possibly reduce the number of stations capable of broadcasting in digital. For example, one proposed spectrum plan would allocate 3.5 MHz in which fourteen DAB channels could be accommodated.[36/] If all potential copycode information had to be transmitted, the time and space requirements necessary to accommodate such information could reduce by one or two the number of stations that could operate within the 3.5 MHz bandwidth. Such a potential loss of efficiency simply cannot be tolerated in today's environment of high demands from all spectrum users. Additionally, inclusion of copy subcode information would increase the complexity, and hence the cost, of consumer receivers that would be required to include subcode decoding circuitry.

In lieu of broadcasting copy code information, NAB suggests as an alternative the SCMS system which already exists in many digital audio tape ("DAT") recorders sold in the United States. The SCMS system employed in DAT recorders, provides a mechanism that can limit the number of digital copies made from other DAT sources. In general, only one additional digital copy of a DAT tape can be made from a pre-recorded master tape. This permits the home taper to make a copy for his own personal use. Similarly, the SCMS system includes logic that can assume recordings made using the analog line inputs of a DAT recorder may include copyrighted works, allowing only one additional digital copy of that tape to be made.

With this system in place, DAB receivers could be designed and constructed to treat all broadcast information as a pre-recorded DAT tape, or as a recording made through the DAT analog line inputs. The broadcaster would not

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36/ This system is the Eureka-147 DAB system.

transmit any copy code information. Instead, the receiver would be "hard wired" to include this SCMS code at its digital audio output, at all times. This would allow home tapers to record programs for their own personal use, while at the same time preventing excessive copying and distribution of program tapes.

VI. Under No Circumstances Should DAB Be Limited To Scrambled Or Encrypted Services.

Requiring digital audio broadcasters to operate on an "encryption" or "scrambled" basis would be the antithesis of the mandate of the Communications Act to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service . . ."[37/] (emphasis supplied). This country's over-the-air broadcast service is based upon an advertising-supported and "free" system. To require the American public to pay directly for enhanced quality audio would be strongly at odds with this basic statutory requirement. Moreover, any such limitations, be they of a quasi-copyright nature or otherwise, would pose serious implications not only for American broadcasting, but for overall communications policy. Indeed, such requirements would unnecessarily divide this country along economic lines into those who could afford the benefits of enhanced broadcast services and those who could not, and would thus go to the very heart of the domestic system of over-the-air broadcasting. Any adoption of such requirements would have a direct adverse impact not only on broadcasters, but also on the listening public.

Limiting the benefits of enhanced digital audio signal quality to those who could afford or who had access to an encrypted service would also contravene well

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37/ 47 USC § 151.

established copyright goals and principles. As summarized in the OTA Study, these principles encompass the notion that:

> Although copyright is a property interest, its primary purpose was not conceived of as the collection of royalties or the protection of property; rather, copyright was developed primarily for the promotion of intellectual pursuits and public knowledge . . . . [T]he grant of a [copyright] monopoly would not be justifiable if the public did not benefit from the copyright system . . . . Policy arguments that equate copyright with royalty income, or theories that assert that copyright is necessary in order to secure royalty income, run counter to this theory and appear to be inconsistent with the intent of the Framers.[38/]

Proper application of these copyright principles clearly require rejecting any proposal that would, by imposing scrambling requirements, result in limiting the public's access to the benefits of DAB technology based upon a justification that scrambling was necessary to collect royalties for record companies and/or recording artists. Moreover, limiting DAB to encrypted transmissions would result in denying, to some of the public, access to the "Progress of Science"[39/] as manifested by DAB technology.

Conclusion

The record industry's track record in predicting the impact of home taping is not reassuring. In 1985, for example, the record industry, armed with the slogan "Don't Let the Music Die," urged Congress to enact legislation to stave off the inevitable decline in revenues that they expected to result from home taping. In fact, RIAA has reported that between 1985 and 1989 the total dollar value of record shipments grew 47%.[40/]

38/ OTA Study, supra at p. 66.

39/ U.S. Constitution, Art. I, sec. 8, cl. 8.

40/ Billboard, March 24, 1990, at 1, 73 ($6.46 billion in manufacturer's dollar value of sales at suggested list price during 1989); OTA Report at 92 (same statistic at $4.39 billion for 1985). The source in each case is the RIAA Market Research Committee.

During the first half of 1990, this rapid growth continued, with a 15 % increase over the comparable period in 1989.[41/] This spectacular success, during a period for which the record industry had predicted stagnation and decline, should make the Office (and Congress) skeptical in assessing the record industry's gloomy predictions about the impact of DAB.

In a letter to OTA during the course of its study, a representative of RIAA observed that: "It is not justifiable to allow advances in technology to undercut the financial health of the music industry based on assumptions and predictions that may never bear out."[42/] To this, NAB would respond that it is also not justifiable to undercut the financial health of an "innocent bystander" -- the broadcasting industry -- by imposing harsh new financial burdens based on speculative predictions about home taping activities over which broadcasters have no control and from which they receive no benefit.

The short answer to the Copyright Office's question of "whether or not delivery of digital audio programming transmitted by . . . terrestrial systems . . . will affect copyright owners" is that it is simply too soon to tell. Hence, any present consideration of compensation proposals or requiring broadcasters to adopt costly and spectrum inefficient copy protection mechanisms would be extraordinarily premature.

Should the Copyright Office nevertheless choose to consider such proposals, NAB submits that currently available empirical data provide no support for: 1) imposing a home taping fee on broadcasters that may choose to employ DAB; or 2) requiring such broadcasters to scramble or encrypt their signal; or 3) requiring such

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41/ Billboard, Oct. 13, 1990, at 1, 87 (as reported by RIAA Market Research Committee).

42/ H. Rosen, RIAA letter to J. Winston, OTA, May 2, 1989 quoted in OTA Study at 50.

broadcasters to transmit digital subcode information. To the contrary, current empirical data supports the conclusion that adopting any of these proposals would impose unfair and unnecessary burdens on broadcasters and be inimical to the interests of the listening and viewing public.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann
Exec. Vice Pres. & General Counsel

Barry D. Umansky
Deputy General Counsel

Benjamin F. P. Ivins
Assistant General Counsel

Marcia De Sonne
Dir. of Technology Assessment
NAB, Research & Planning

Stan Salek
Staff Engineer
NAB, Science & Technology

December 17, 1990

APPENDIX A

EXCERPTS OF:

COMMENTS OF THE HOME RECORDING RIGHTS COALITION

Filed in FCC General Docket No. 90-357
FCC 90-281
November 13, 1990

II. The Commission Should Not Mandate Inclusion of Unnecessary Subcode Information.

RIAA misleadingly suggests that the technical subcode information it asks the Commission to make mandatory is "essential" for reception or recording[7] of the digital broadcast signal. RIAA Comments at 7-8. In fact, as RIAA knows, all essential subcodes for reception and recording already will be supplied by the signal or by default by the digital receiver.[8]

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[6] RIAA also offers no evidence to suggest that the improved sonic quality of digital radio automatically would translate into increased home taping from broadcasts. In fact, OTA found that even basic technological distinctions such as grades of blank tape, or developments such as dual-cassette and high-speed dubbing decks, have not affected consumer taping habits. Id. at 146.

[7] Curiously, the RIAA in one section of its Comments decries home taping while insisting in another section that subcode information to enable home taping is "essential."

[8] For example, the International Electrotechnical Commission standards for implementing the Serial Copy Management System require that digital broadcast receivers that issue subcode information in an IEC 958 interface signal must indicate in the output signal that the broadcast material is protected by copyright (unless intentionally overridden by the broadcaster) and that the material is of an original generation status. These same standards would have been mandated under United States law by the Digital Audio Tape Recorder Act of 1990, and the Technical Reference Document incorporated therein by reference and published in 136 Cong. Rec. E376 (Feb. 26, 1990).

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RIAA's brazen attempt to slip through subcode information for "accounting" and "collection and/or distribution of royalties related thereto" is completely unjustifiable and presumptuous. Copyright law does not impose royalty taxes on either broadcasting or home recording of broadcast music. Prior RIAA attempts to impose performance royalties or royalty taxes on blank tape and/or recorders have been rejected soundly by Congress. Thus, RIAA's request for mandatory royalty and collection subcodes is, at best, highly premature and, at worst, an insidious attempt to impose administratively what it has been unable to achieve legislatively. It would be inappropriate to mandate broadcaster expenditures simply to satisfy RIAA's wishful thinking.

In fact, RIAA has recognized that such matters must be addressed by Congress rather than the Commission. Provisions addressing the limited circumstances in which inclusion of subcode information relating to the operation of the Serial Copy Management System[9] would have been addressed in the Digital Audio Tape Recorder Act of 1990, which was considered in the 101st Congress by both the House and Senate as H.R. 4096 and S. 2358, respectively. These bills, which were not enacted into law, were drafted in consultation with RIAA and HRRC, and submitted to Congress with their mutual support.

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[9] The Serial Copy Management System (SCMS) is designed not to prevent the making of first-generation digital tape copies from copyrighted digital sources (such as broadcasts, CDs or digital audio tapes), but to preclude the making of further generations of digital copies from those first-generation copies. SCMS is implemented in digital audio tape recorders currently offered for sale in the U.S. consumer market.

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However, these bills included an essential safeguard for consumers, noticeably absent from RIAA's proposal to this Commission, that would require the recording industry to encode phonorecords to work accurately in conjunction with the Serial Copy Management System.[10] If recording companies, instead, encode products furnished to broadcasters so as to "fool" DAT recorders, the RIAA's suggested mandatory broadcast of these subcodes could prevent all home taping from broadcasts. By asking the Commission to require administratively the broadcast of these codes, without the complementary safeguard, RIAA is asking the Commission to make an end run around Congress and the courts, so as to allow record companies unilaterally to frustrate home tapers.

The remaining subcodes described by RIAA similarly serve the private commercial interests of the recording industry rather than the interests of the public. If a broadcaster believes that supplying information regarding artists, songwriters, tracking times, liner notes, etc., may be of benefit to the public, it voluntarily may do so or, if necessary, may contract with record companies to make such information available. There is no need to mandate the inclusion of such optional information, and thereby

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[10] Section 3(d) of the Digital Audio Tape Recorder Act of 1990 provides in relevant part:

> ENCODING OF INFORMATION ON PHONORECORDS.--(1) No person shall encode a phonorecord of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material so as to improperly affect the operation of the serial copy management system.

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force broadcasters to incur additional burden and expense that may not be justified by commercial or policy considerations.[11]

HRRC submits that the Commission should resist RIAA's invitation to usurp Congressional legislative authority. The Commission should reject RIAA's suggestion of mandatory inclusion of digital subcodes in digital radio signals.

[11] Specifically to avoid such burdens, Section 3(e) of the Digital Audio Tape Recorder Act of 1990 intentionally was drafted to give broadcasters the option to transmit no subcode information whatsoever; but if the broadcaster chose to transmit any subcode information, only the subcode asserting (or not asserting) copyright protection for the work was required to be accurately transmitted.

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Comment Letter
RM 90-6
No. 11

REID & PRIEST
MARKET SQUARE
701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
202 508-4000

GENERAL COUNSEL
OF COPYRIGHTS
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NEW YORK OFFICE
40 WEST 57TH STREET
NEW YORK, N.Y. 10019-4097
212 603-2000
FACSIMILE: 212 603-2206
CABLE ADDRESS: "REIDAPT"
TELEX: 710581672I RDPT NYK
220534 RDPT UR

WASHINGTON OFFICE
FACSIMILE: 202 508-4321
TELEX: 440630 RP WASH

DIRECT DIAL NUMBER

December 18, 1990

BY HAND

Dorothy Schrader, Esq.
General Counsel
Copyright Office, Library of Congress
James Madison Memorial Building, Room 407
Washington, D.C.

Re: Digital Audio Broadcast and Cable Services,
Docket No. RM90-6

Dear Ms. Schrader:

Enclosed for filing in the captioned proceeding please find eleven copies of a corrected version of a letter previously filed in this proceeding by Broadcast Music, Inc. on December 14, 1990. The letter has been revised to reflect two minor corrections: In paragraph 3, line 5, on page 2, "analog cable radio services" has been changed to read "digital cable radio services"; in the same paragraph, line 11, "digital service owner" has been changed to read "digital broadcast service owner."

If you have any questions about this matter or desire further information, please contact the undersigned.

Thank you for your assistance.

Sincerely,

Michael W. Faber

MWF/mwh
Enclosure

cc: Edward W. Chapin, Esq.
Joseph J. DiMona, Esq.

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BMI

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Comment Letter
RM 90-6
No. 11

Frances W. Preston
President and Chief Executive Officer

December 14, 1990

The Hon. Ralph Oman
Register of Copyrights
United States Copyright Office
Library of Congress
Dept. 17
Washington, D.C. 20540

Re: Digital Audio Broadcast and Cable Services
Docket No. RM 90-6

Dear Mr. Oman:

We are responding to your Notice of Inquiry in the October 24, 1990 Federal Register regarding the effects that implementation of digital audio broadcast and cable services may have on copyright owners.

Because of BMI's longstanding concern that new technology which can deliver music to the public operate so as not to deprive the creators of the music of their just remuneration, we are concerned that the proposed DAB services will adversely affect owners of copyright in both musical works and sound recordings.

Vinyl recordings have all but become extinct because of the popularity of the compact disc. DAB represents a similar threat. The copyright community cannot afford to wait and see if home taping will suddenly increase a hundredfold once DAB is available. Should that happen without a built-in compensation scheme, the results would be devastating, and it might be too late.

Specifically in answer to your first question, given the success in the marketplace that compact discs have generated, we envision a similar public embracing of digital audio broadcasts. Whether the mere fact that the sound quality is superior to analog broadcasts would cause listeners not otherwise predisposed to home-tape to do so is speculative, but the assumption can be fairly made that the universe of potential home tapers would likely grow somewhat, if only by a small amount, because of the increased quality that became available.

320 West 57th Street, New York, NY 10019 (212) 830-2500 Fax: (212) 246-2163 Telex: 127823

In reply to question 2, since it is likely that the bulk of the music that would be programmed by DAB services would be current popular hits, the potential for lost revenue by copyright owners increases substantially when one can make a CD-quality tape at home for far less effort and cost than is involved in purchasing a compact disc. The potential for loss to composers and copyright holders is further aggravated because of the likelihood of some form of digital audio recording equipment being available to the consumer in the same time frame. This will enable anyone to make a digital recording indistinguishable in quality from what one might purchase in a record store.

We are also concerned about reports of presentation of entire albums of material via digital audio broadcasting in the home. If this takes place, there will be a direct replacement of pre-recorded product purchases through retail channels. Although some mechanism might emerge to compensate songwriters, composers, copyright holders, artists, record companies and others at interest, it is not apparent at this time. The magnitude of lost revenues to the creative participants in the music industry should such "digital home taping" become prevalent--as video home taping is today--would be catastrophic.

With respect to your third question, namely, whether a copyright owner or his performing rights organization would have the practical ability to negotiate with owners/operators of digital audio services, we can assure you that such negotiation can indeed take place. BMI has, in fact, recently entered into an agreement with two digital cable radio services which will produce additional performance income to our over 100,000 writers and publishers. Since it is the transmission of the copyrighted music, rather than the quality of the signal, that is germane to the licensing responsibility, there is no reason that BMI could not consummate a similar license with a digital broadcast service owner or operator. And, as in other areas of music use, the owner or operator of a DAB service could negotiate with individual copyright owners themselves, should they seek a performance license directly.

In answer to question number 4, a royalty to account for whatever home taping is likely to result from DAB transmissions could be imposed upon either blank tape or digital recording equipment manufacturers or sellers to be remitted to the Copyright Royalty Tribunal or other appropriate agency for distribution. The distribution could follow an industry-negotiated formula for division among participants such as was embodied in previous home taping legislation and is currently under discussion for home taping royalty legislation, or through submission of claims by and hearing of the affected parties before the CRT.

Alternatively, as raised by your fifth question, the DAB signal could be compelled to be scrambled, so that it could only be received with special equipment. Of course, the rental or sale of any such descrambling device would have to contemplate the inclusion of a royalty for distribution to copyright owners through the CRT. Merely scrambling the signal without providing for a royalty would not address the problem of unauthorized recording. This alternative is not as equitable as a royalty collected through recording equipment, however, since those members of the public who merely wish to listen to digital broadcasts, rather than to record them, would be forced to pay the royalty along with the home tapers. Focusing the levy on the tapes and machinery essential to recording would more fairly strike the balance between the public interest in receiving the technology and the copyright owners' right to be compensated for the use of their property.

We have no comments with respect to questions 6 or 7.

BMI hopes that, before the DAB industry moves from the developmental to the marketing stage, Congress recognizes the potential for harm to copyright owners if some kind of compensation mechanism is not adopted in advance. Although earlier technological advances have not convinced Congress to so act, DAB services present the greatest threat in a long time to the copyright owner because of the known superior quality of digital recordings. It is much more palatable, both for the public and Congress, to delay introduction of such services into the marketplace until a compensation plan is factored into their delivery than to allow them to be introduced without one and raise the cost by attempting to impose one later.

Although BMI will be able to do its part in licensing the services for the transmissions into the home, that will serve as no consolation to the owners of copyright in sound recordings that do not get sold or copyright owners of musical works that do not receive mechanical royalties. A copyright owner must know that he will be entitled to all that the law entitles him if he is to continue to disseminate his product to the world. In that way, the public benefits through continued widespread availablity of copyrighted works.

For these reasons, BMI urges your office to report to Congress that a system which provides royalty compensation through either recording or receiving equipment is appropriate and necessary in the DAB context. We look forward to addressing these issues further in reply comments and at any public hearing you may hold, as well as with respect to any legislation which may in fact be introduced.

Very truly yours,

Frances W. Preston

THE NEW YORK PATENT, TRADEMARK
AND COPYRIGHT LAW ASSOCIATION, INC.

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Comment Letter
RM 90-6
No. 12

PRESIDENT
Frank F. Scheck
1155 Avenue of the Americas
New York, NY 10036
(212) 790-9090

PRESIDENT-ELECT
Peter Saxon
277 Park Avenue
New York, NY 10172
(212) 758-2400

1st VICE PRESIDENT
M. Andrea Ryan
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

2nd VICE PRESIDENT
William J. Gabrath
875 Third Avenue
New York, NY 10022
(212) 715-0600

TREASURER
Howard B. Barnaby
330 Madison Avenue
New York, NY 10017
(212) 682-9840

SECRETARY
Pasquale A. Razzano
530 Fifth Avenue
New York, NY 10036
(212) 840-3333

IMMEDIATE PAST PRESIDENT
John B. Pegram
45 Rockefeller Plaza
New York, NY 10111
(212) 757-2200

BOARD OF DIRECTORS
Dale L. Carlson
John E. Kidd
Evelyn M. Sommer
Martin E. Goldstein
Thomas L. Creel
Stanley J. Silverberg
Robert L. Baechtold
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Virginia R. Richard

and the
Above

December 18, 1990

BY TELEFAX

United States Copyright Office
Library of Congress
Department 17
Washington, D. C. 20540

Attention: Mr. Ralph Oman, Register of Copyrights

Re: Copyright Office Study: Digital Audio Broadcast and Cable Services [Docket No. 90-6]

Dear Sirs/Madams:

Our Association is pleased to respond to the specific inquiries posed in your Notice in the Federal Register of October 24, 1990. Please consider these responses as preliminary, because we believe that the overall matter is a serious issue which may become the subject of litigation; accordingly, it deserves very considerable study which we have not yet had ample opportunity to give it.

1. **Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works? Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies, or on television? To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?**

A: We do not believe that listeners would be substantially more likely to copy digitally transmitted works then they are now likely to copy AM or FM broadcasts. We do not believe that there is a feasible and acceptable way to monitor home taping habits, nor are we aware of technical limitations on home taping that would be practical solutions to copyright violations.

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THE NEW YORK PATENT, TRADEMARK
AND COPYRIGHT LAW ASSOCIATION, INC.

PRESIDENT
Frank F. Scherck
1155 Avenue of the Americas
New York, NY 10036
(212) 790-9090

PRESIDENT-ELECT
Peter Saxon
277 Park Avenue
New York, NY 10172
(212) 758-2400

1st VICE PRESIDENT
M. Andrew Ryan
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

2nd VICE PRESIDENT
William J. Gilbreth
875 Third Avenue
New York, NY 10022
(212) 715-0600

TREASURER
Howard B. Barnaby
330 Madison Avenue
New York, NY 10017
(212) 682-9640

SECRETARY
Pasquale A. Razzano
530 Fifth Avenue
New York, NY 10036
(212) 840-3333

IMMEDIATE PAST PRESIDENT
John B. Pegram
45 Rockefeller Plaza
New York, NY 10111
(212) 757-2200

BOARD OF DIRECTORS
Dale L. Carlson
John E. Kidd
Evelyn M. Sommer
Martin E. Goldstein
Thomas L. Creel
Stanley J. Silverberg
Robert L. Baechtold
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and the Above

Virtually every improvement in recording and transmitting equipment (better tapes, tape heads, transport mechanisms, noise reduction systems, receivers, antennas) makes the recorded material better, more listenable, closer to the source material in quality, and therefore more desirable. DAT broadcasting, like DAT tapes and CDs, although significant improvements, should not be treated differently from incremental improvements. DAT broadcasting will contribute at most, a very minor additional incentive to copy.

2. Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, or compact discs?

A. While it is probable that there would be some loss of sales of copyrighted works (for example CDs) because of listeners taping digital audio signals, we do not believe this will be significant enough to worry about.

3. Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for compensation for transmission of his/her works? If not, could representatives of copyright owners, such as performing rights organizations, accomplish this task?

A. Copyright owners will not have the practical ability to negotiate with digital audio transmitters, for the most part, for the same reason that individual copyright owners do not now have the ability to negotiate with conventional broadcasters. However, we see no reason why the performing rights organizations (BMI, ASCAP, etc.) could not represent copyright owners in this arena in the same way that they do now.

4. Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be distributed among copyright claimants? If so, who would be responsible for administering this process?

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THE NEW YORK PATENT, TRADEMARK
AND COPYRIGHT LAW ASSOCIATION, INC.

PRESIDENT
Frank F. Scheck
1155 Avenue of the Americas
New York, NY 10036
(212) 790-9090

PRESIDENT-ELECT
Peter Saxon
277 Park Avenue
New York, NY 10172
(212) 758-2400

1st VICE PRESIDENT
M. Andrea Ryan
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

2nd VICE PRESIDENT
William J. Gilbreth
875 Third Avenue
New York, NY 10022
(212) 715-0600

TREASURER
Howard B. Barnaby
330 Madison Avenue
New York, NY 10017
(212) 682-9640

SECRETARY
Pasquale A. Razzano
530 Fifth Avenue
New York, NY 10036
(212) 840-3333

IMMEDIATE PAST PRESIDENT
John B. Pegram
45 Rockefeller Plaza
New York, NY 10111
(212) 757-2200

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and the
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A. The majority of this Association's Board of Directors and the Association's Copyright Committee feel strongly that placing a royalty on recording materials is not an appropriate solution to the copyright infringement problem, if there is one. This solution has been considered in connection with convenience copiers, video tape recorders and the like. It imposes a tax on the purchasers or users of these devices who do not violate copyright laws and that does not seem acceptable.

5. Should digital audio broadcasters be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for the possible copying of copyrighted works?

A. We do not believe that broadcasters should be forced to scramble their broadcasts to police the copyright infringement potential. We do not believe that the potential for infringement is large enough to warrant this difficult and expensive task and our expectation is that determined infringers (the ones who will create the largest problem) will readily discover unscrambling solutions.

This Association has no information or expertise that would justify our attempting to respond to your inquiries Nos. 6 and 7.

Our Association stands ready to assist you in connection with intellectual property law matters and would appreciate the opportunity to meet with a member of your staff regarding the digital audio transmission matter. Ours is the nation's largest regional intellectual property law group with over 1,000 members. We have long taken an active role in the drafting of legislation and treaties within our fields of expertise. Over the past several years, our representatives have been active participants in meetings of the World Intellectual Property Organization's meetings on patent and trademark law harmonization, and other intellectual property law topics.

Very truly yours,

362 Frank F. Scheck

Frank F. Scheck

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NATIONAL SCHOOL BOARDS ASSOCIATION

OFFICE OF THE GENERAL COUNSEL

August W. Steinhilber
General Counsel

Gwendolyn H. Gregory
Deputy General Counsel

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Staff Attorney

Susan R. Butler
Director, Administrative Dept.

Jennifer A. Williamson
Manager, Legal Services

Martha C. Fricke
NSBA President

Thomas A. Shannon
NSBA Executive Director

Comment Letter
RM 90-6
No. 13

December 14, 1990

Mr. Ralph Omen
The Register of Copyrights
Library of Congress
Department 17
Washington, DC 20540

Dear Ralph:

This letter is in response to your Notice of Inquiry concerning Digital Audio Broadcast and Cable Services that appeared in the October 24, 1990 Federal Register. Its purpose is to raise issues of public policy not to provide legal rationales. The expertise in the Copyright Office can provide that kind of legal analysis far better and far more objectively than we can.

We, in education, are somewhat concerned over the possible preconceived direction of the Study. Senator DeConcini asked "how the rights of copyright owners...are protected..." and to include "any recommendations that may be necessary...". The first question is a factual request while the answer to the second question could range over a wide spectrum of options ranging from recommending a computer licensing system to conclude that there may be need for no recommendation at all. The series of questions raised in your notice seem to point to a direction and a conclusion -- a need for more protection.

Any recommendation with respect to additional copyright protection must be viewed not only from the position of the rights of copyright owners but also from the public policy and constitutional questions of whether any recommendation really encourages further creativity. The discussion of creativity is not limited to the creativity of owners of the music copyright. Creativity must include a discussion of whether any proposal discourages directly or indirectly, advances in technology. If the United States is to succeed in the 21st Century, it will be because of our intellect and ability to develop and use technologies which are not now available. Restrictions based on copyright are necessary when they promote creativity and are not necessary if their

GENERAL COUNSEL
OF COPYRIGHT
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1680 Duke Street, Alexandria, Virginia 22314 • (703) 838-6722
FAX • (703) 683-7590

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purpose is to promote protectionism. Protectionism can injure creativity by stifling an industry that has yet to be developed. Historically, copyright has not been successful in restricting new technology and any attempt to do so now is ill conceived.

There are several recent examples which conclusively show that those in the recording and movie industries are not always correct in their comments about creativity and impact on the market.

The first is the history of statements made to the press and to Congress before and after the decision in *Sony Corporation v. Universal City Studios*. The first cry we all heard was that video recorders would destroy the movie industry and/or badly damage the television industry. Corporations formed fancy-sounding lobbying groups such as the "Committee to save American Jobs". Heads of the movie industry appeared on nightly T.V.news programs predicting doom. All types of "corrective" schemes were put forth such as restricting the importation of V.C.R's and taxing V.C.R's or video tape --- the proceeds of which would be distributed back to the movie or television industry. All the predictions were basically proven false and a new and more profitable industry has developed. Huge profits are now made from the sale and rental of video tapes and copyright owners have benefitted from the results.

The second example involves the recording industry. Several years ago that industry was experiencing extreme financial difficulty. Immediately, tape decks were blamed because "everybody is making copies of recorded tapes and our market is being destroyed." Once again, we heard the cry to tax blank audio tapes and/or restrict twin tape recorders. Teens were singled out as the biggest culprit in making illegal copies. It was assumed that since recording sales to teens had dropped dramatically, they must be making illegal copies. On closer inspection, it was discovered that teens had changed their spending habits and were using their funds on PACKMAN and other video games. What really had happened was that in the competition of the market place, the recording industry had not produced the kinds of products that teens wanted to buy. Since then they have reverted back to the purchasing of recordings and the recording industry is healthy.

Now may we respond to the questions raised in your notice of inquiry. Question 1 asks about the average listener, taping practices and monitoring mechanisms.

> Comment (1): The first concern the copyright office should have is that the data you receive is reliable. It might be necessary to set up the equivalent of a 108(i) study to make sure that the data is correct and is not merely the conjecture of any and all special interest groups whose motive can be bluntly stated "to make more money for themselves and their clients"..

Comment (2): The second comment is that the copyright office should remember that some (or most, depending on the point of view of any individual commentator) of the copying will be of material in the public domain, such as classical music or the music of the 1920's and 1930's. Even that copying is difficult to accomplish because the person making the copy needs to know what will be broadcast and at what time to set up the proper taping equipment. Many classical studio stations currently provide that information but, to our knowledge, that is not the case for popular music not in public domain. (Speaking personally, taping is a pain and although I have the equipment, it is simply easier to purchase a tape or compact disc of the music I wish to have than it is to try to set up the equipment for the exact time and station on which that specific music is to be played).

Comment (3): The entire issue of monitoring raises major constitutional issues of the right to privacy. We strongly recommend that any discussion of monitoring of private homes include representatives of civil rights organizations such as the American Civil Liberties Union, the Lawyers Committee for Civil Rights, etc.

Question 2 asks for comments on the impact on sales of copying by listeners.

Once again, this may require an independent survey or study. (In reality, no one has a statistically valid answer to the question.) It must be noted that video tapes are available for the recent Civil War series even though it could have been easily taped. However, the asking of the question on sales impact does provide an avenue that some groups can use to raise the need for performance rights. Performance rights have been discussed several times in Congress and rejected. The Copyright Office is probably well advised to leave the issue of performance rights alone. Never have the proponents been able to show a need, based on a public policy basis, or evidence of irrefutable damage under the current system. Even an argument based on international copyright is not valid. The United States is a member of Berne. On the subject of neighboring rights, the U.S. is a member of Geneva and given the state of U.S. law on contractual rights and legal rights with respect to sound recordings, the U.S. could join Rome without having to change domestic law.

Question 3 - No comment.

Question 4 asks for comments on the placing of a "royalty" on blank tapes.

This was a bad idea when first suggested for audio tapes, it was a bad idea when suggested for video tapes and it's still a bad idea. We, in education, will demand an exemption from this tax. In reality, it is a tax (not a royalty) placed on a product by the federal government for the benefit of certain

private interests. Any discussion of this issue will also have to include questions such as how to provide some mechanism to exempt some groups, how to exempt from this tax certain uses currently permitted under copyright law, etc.

Question 5 - No Comment

Question 6 - No Comment

Question 7 - No Comment

The Copyright Office should address two other questions in the same detail as it does those proposed:

1. How can fair use be guaranteed for digital audio broadcasting?

2. How can legitimate taping beyond fair use be protected? (Material in public domain; university and school use of new technology in their own music programs or in their own career development/vocational educational programs.)

The major problem that we, in education, have with respect to digital audio broadcasting is not copying by the average listener but commercial piracy. How can we be assured that tapes which we purchase are not the product of pirates? (A problem which we have encountered on computer programs.) Is there a need to develop some special criminal statutes that cover commercial piracy of digital audio transmissions? For example, in criminal drug laws, the possession of a certain amount of the illegal drug raises a presumption that the person is a dealer not just a user. Are similar presumptions possible with respect to taping piracy? One must be careful in the drafting of such a law not to violate the rights of someone who might be described as an "honest hacker" or someone whose hobby is electronics.

We wish you well in this study. If there is any further information you might need from us, please let me know.

Sincerely,

Gus

August W. Steinhilber
General Counsel

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Comment Letter
RM 90-6
No. 14

Before the
Library of Congress, Copyright Office
Washington, D.C.

In the Matter of	)	
	)	
Notice of Inquiry re Digital Audio Broadcast and Cable Services; Copyright Office Study	)	Docket No. RM 90-6

COMMENTS OF GENERAL INSTRUMENT CORPORATION

I. INTRODUCTION

General Instrument Corporation ("GIC") submits these comments in response to the Notice of Inquiry, published in the Federal Register on October 24, 1990 ("Notice"), examining the effects new digital audio broadcast and cable services may have on copyright owners. The Notice states that it was issued in response to a Congressional request and seeks proposals on the proper methods of compensating copyright owners while promoting the greatest availability of creative works to the public.

A. The Nature of GIC's Interest in Digital Audio Services.

GIC is a manufacturer and supplier of electronic products, systems and components. GIC's VideoCipher Division manufactures a C-band satellite broadcast video signal scrambling system and descrambling equipment. GIC's Comm-Scope Division supplies coaxial cable to the cable television industry. The

Jerrold Communications Division of GIC is a leading manufacturer of cable television equipment.

B. **The Digital Cable Radio Service Provided by GIC's Jerrold Communications Division.**

Jerrold is also the pioneer in the provision of digital audio service to cable television systems. This service, called Digital Cable Radio ("DCR"), is a commercial-free premium audio service delivering CD-quality sound programming 24 hours a day via satellite transmission to cable operators. DCR service, which at present is offered only to subscribers of cable television systems, provides 19 audio channels with a variety of music which may be selected by the subscriber, including jazz, rock, classical, country and easy listening. DCR also offers 9 digital audio channels for cable TV simulcasts which can be used in conjunction with cable TV music channels and premium TV channels. It is technically feasible to expand DCR to carry hundreds of channels of audio programming. Consumer market testing of DCR in 12 test markets resulted in nearly 90 percent of the consumers surveyed stating that the service met or exceeded their expectations. As of this date, GIC has entered into agreements with 17 cable operators.

DCR delivers to consumers audio sound quality equivalent to that produced by compact discs, employing a technology jointly developed by Jerrold and Dolby Laboratories. The DCR system requires a digital tuner which is installed in the

subscriber's home. DCR uses the Dolby adaptive delta modulation (ADM) coding system. This system was designed specifically for satellite audio delivery and is used in various transmission and recording applications world-wide.[1] Programming for DCR is generated at a satellite uplink location. Individual channels are digitally encoded using the Dolby ADM method and encrypted. Forward error detection and correction data are added and the individual channels are multiplexed together for transmission by satellite. A QPSK digital modulation method is used for satellite transmission. The multiplexed signal is carried on a C-band satellite.

At each cable headend, the satellite signal is received, broken into discrete program channels, and error-corrected. The signal is then transmitted over the cable using QPSK modulation. Frequencies on the cable system are chosen based on existing frequency usage and typically fit into ranges not suitable for video carriage. Signals carried are 15 dB lower than video carriers to avoid interference with video programming.

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[1] The system is described in CCIR Report 953-1. Additional information about the DCR system is contained in Craig Todd, Digital Sound and Data for Broadcast Television, 1987 NAB Engineering Conference Proceedings at 219; Steven Forshay, Economical Digital Audio for Broadcasting, Electronics and Wireless World, March 1987; William Mead, Multi-Dimensional Audio for Stereo and Television, Broadcast Engineer, July 1987; comments of Dolby Laboratories in FCC Docket No. 87-268 (Advanced Television), November 1987, and references cited therein.

II. COMMENTS IN RESPONSE TO THE NOTICE

As described in the Notice, this inquiry responds to a request from Senator Dennis DeConcini of Arizona, Chairman of the Senate Subcommittee on Patents, Copyrights and Trademarks, that the Copyright Office conduct a study "to determine how the rights of copyrights (sic) owners of sound recordings and performers are protected with respect to digital audio transmissions," including "any recommendations as to any additional means that may be necessary to protect the rights of copyright owners." 55 Fed. Reg. at 42,917. Although this inquiry is thus focused on the effects of digital audio transmissions on copyright owners, as observed by the Office of Technology Assessment study entitled "Copyright & Home Copying: Technology Challenges the Law" (1989) (hereinafter "OTA Study"), "audio-taping has been widespread for years," and digital audio transmissions raise the same copyright issues presented by other new technologies, including digital audio tape, compact discs and other signal delivery and copying systems. OTA Study at 16.

GIC agrees with the OTA Study that the copyright issues raised by the availability of digital audio services are part of broader questions about the status of home copying of works from TV, CDs, conventional radio broadcasts and other private uses of copyrighted materials. OTA Study at 8. Digital audio broadcast and cable services are not sufficiently different from other modes of music transmission or reproduction to justify different

treatment under the copyright law. Nor will digital audio transmission, even when coupled with digital audio tape capability, bring about such a change in home taping practices as to call for a change in the manner in which the copyright law treats home copying.

As observed by the OTA study,

> "New technologies are able to extend the traditional bounds of copyright to include private use. The major question facing Congress is whether extending copyright proprietors' rights to private use is necessary to serve the public interest." OTA Study at 16 (footnote omitted).

Thus, the fundamental question underlying all of the issues raised in the Notice is whether it is in the public interest to extend copyright holders' rights to private use. Congress has determined up to now that it is not; as we believe we make clear in our response to the specific questions asked by the Notice, the introduction of digital audio services should not result in a different conclusion.

GIC has the following comments with regard to the specific questions posed by the Copyright Office in its Notice:

III. GIC'S COMMENTS ON THE SPECIFIC QUESTIONS CONTAINED IN THE NOTICE

1. The first set of questions posed by the Copyright Office in its Notice asks whether the advent of digital audio broadcasting services will prompt the average listener to copy, whether a listener will be more likely to copy digitally transmitted works than works broadcast on AM or FM radio or on television, and to what extent a listener's home taping habits can be monitored.

There is no evidence that digital audio is more likely to be copied by "the average listener" than is now the case with respect to AM, FM or television broadcast signals. Although digital audio signals are superior in sound quality to signals presently broadcast on AM and FM radio and on TV, there is no reason to believe that the improved quality would result in significant shifts in home taping practices. In a recent survey [OTA Study at 160), about two-thirds of U.S. households which have done some home taping were unable to describe the quality of the tape they used. This general lack of focus on sound quality by a majority of the home tapers surveyed indicates that even though digital audio signals will produce superior home taping results, the average listener is not so concerned with sound quality as to change his or her taping habits dramatically for this reason. Put in other terms, although digital audio and CDs are superior to analog transmissions and conventional recording media, the older technology already produces sound quality which

is superior to recording quality considered satisfactory for most private use.

We are aware that other views have been expressed on this point. However, GIC submits that efforts to predict at this early stage of development the extent to which digital audio service will result in greater amounts of home taping by the average listener are highly speculative. This is so even if the widespread use of digital tape recorders by home tapers is presumed. Most importantly, even if there were credible support for the proposition that there will be increased taping by the average listener because of the availability of digital audio radio and digital audio tape recorders, the economic consequences to the music industry of increased home taping is entirely uncertain. The OTA Study points out that "the same survey information can support widely different estimates, yet this type of uncertainty is unlikely to be reduced by more data." In the absence of hard evidence that digital audio radio will result in a significant increase in home taping which, in turn, will significantly adversely affect the economic interests of record manufacturers, performers and composers, there is simply no basis for recommending to Congress that it consider departing from the long-held principle of American copyright law that the making of copies for home use does not constitute copyright infringement. See OTA Study at 5-6.

Although it is likely that some means could be devised to monitor home taping practices, this kind of intrusion on private activity is inconsistent with American traditions. If home copying goes beyond the making of copies for time or place shifting for personal use, it becomes piracy and remedies under existing law are, of course, available.

2. The second question asked in the Notice is whether the copying of works transmitted via digital audio services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes or compact discs.

GIC's comments on this question are closely related to its response to the first question to the effect that the introduction of digital audio broadcasting services will not generate significantly larger amounts of home copying than now occurs. Therefore, there is no reason to believe that copying of works received via digital audio transmission will displace sales of copyrighted works recorded on phonorecords, audio tapes or compact discs. In addition, as the OTA Study points out, the increased exposure to the listening public of works that are received via digital audio transmission may stimulate the purchase of those works in phonorecord, audio tape or compact disc form. See OTA Study at 11. The stimulation of additional purchases of works in recorded format by persons who hear those works on digital audio radio is even more likely to occur, because the many channels available with the DCR service offered

by GIC, as well as services to be offered by others, will result in works being played that are not aired by conventional radio stations which tend to concentrate on the most popular works. GIC's experience is that nearly a third of its DCR listeners sampled music to which they did not normally listen. Thus, works that currently receive very little radio exposure are more likely to receive exposure via digital audio cable or broadcast transmission to subscribers. We believe that the diversity of audio service formats which will be provided are greater than those available from radio in all but the largest metropolitan markets.

Of course, GIC opposes all forms of illegal copying. Technology to restrict unauthorized commercial copying is available in the form of the Serial Copy Management System ("SCMS") which was the subject of Congressional consideration in the 101st Congress and will probably be reintroduced in the 102nd Congress.

3. Question 3 in the Notice inquires if copyright owners have the practical ability to negotiate with the owners/operators of digital audio services for compensation for transmission of copyrighted works or whether performing rights organizations could accomplish this task.

For the same reasons that have given rise to the existence of the performing rights organizations, it would seem

impractical for individual copyright owners to negotiate with the owners or operators of digital audio services for compensation for transmission of those works. This is certainly the case with regard to radio, television and jukeboxes. However, it is practical for performing rights organizations to accomplish this task and they are doing so. GIC has entered into license agreements with the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. These arrangements provide for fair compensation to the owners of the copyrights in works to be transmitted by GIC.

4. Item 4 in the Notice asks whether a royalty should be placed on recording material such as blank tapes or on digital recording equipment to be distributed among copyright claimants.

Given the lack of evidence that digital audio transmission will give rise to any proper copyright claims by copyright owners, it appears highly premature to consider placing a "royalty" on recording materials or equipment. The need for a royalty in addition to the compensation already received by performers, composers and record manufacturers has not been established, and, if no substantial additional home copying will result from digital audio transmissions, as we believe to be the case, there is no occasion to provide any additional royalties other those which will be received through arrangements with performing rights societies. Further, the imposition of a royalty on tapes or recording equipment, or both, would impose

additional costs on purchasers of those items, whether or not they use the materials for home taping of copyrighted works. As pointed out in the OTA Study, blank tapes and tape recorders are used for a variety of purposes, including the taping of non-copyrighted materials, such as lectures, dictation, telephone answering machines and the like. OTA Study at 29-31.

5. Question 5 in the Notice asks whether digital audio broadcasters should be forced to scramble broadcasts so that listeners who want to receive the signal containing copyrighted works would be forced to acquire decoding equipment "thereby becoming accountable for the possible copying of copyrighted works."

It should be recognized that encryption of digital audio signals, requiring decryption by subscribers, does not necessarily result in the subscribers becoming "accountable" for copying of copyrighted works. For example, GIC's digital audio service is a conditional access service; it is available only to those cable TV subscribers who have subscribed to it. For security purposes the signal is transmitted in scrambled form and descrambled by equipment furnished to the authorized subscriber. No mechanism to detect or prevent copying of this signal by an authorized subscriber is incorporated. Although it may be technically possible to include a subcode in the transmission which might be used to monitor copying, such an arrangement is highly undesirable for the following reasons.

DCR contains a control data stream that authorizes the tuner to decode the audio programming. This control data stream does not at this time contain any coding information related to copy protection that might be contained in prerecorded works. This is because the programming source material is digital compact discs converted to analog sound at the DCR uplink and then digitally encoded with the Dolby algorithm. There is no provision in DCR for directly taking the digital bit stream from the CD (or digital audio tape) and transmitting that digital stream. Indeed, the digital pulse code modulation ("PCM") methods used for CDs and DATs in directly linked storage and playback for home audio systems are inappropriate transmission coding methods. Moreover, the DCR tuner does not have a digital audio output port and does not provide subscribers with any means to make direct digital copies of the programming. Any home copying of DCR programming today would have to be done from DCR's analog output. For further understanding of considerations of playback using PCM versus transmission using Dolby's ADM, please see Appendix A.

6. This item asks for a description of existing and contemplated digital audio transmission services, including the following:

(a) Encryption Systems. GIC randomizes transmitted data which can only be deciphered with a key pattern disseminated to authorized sites.

(b) The means of transmitting prerecorded digital signals. See the discussion of GIC's DCR service at pp. 2-3 of these comments as well as response to question 5 above, including Appendix A.

(c) Any plans to compress the digital signals. As expected of all digital transmission methodologies, GIC uses compression to realize efficient utilization of bandwidth and to make available bandwidth for error correcting of noise incurred during transmission. See Appendix A for further discussion.

(d) Any proposals concerning transmission of digital sub code information embodied on prerecorded works. At present, GIC has no plans to transmit digital subcode information that may be embodied on prerecorded works because, as described in the response to item 5 above, transmission of digital subcode information is incompatible with the transmission method used for DCR. Any change in that method to permit the transmission of digital subcode information would at a minimum require a complete redesign and replacement of substantial elements of the DCR system.

7. This item asks for information relating to the business and commercial aspects of digital audio transmission services, including:

(a) GIC is unsure of other services' activities. As to its own service, GIC expects that it will enjoy participation by perhaps 5% of cable subscribers within affiliated systems.

(b) GIC began regular transmission of Digital Cable Radio May 21, 1990.

(c) A description of the music channel offerings -- both existing and contemplated:

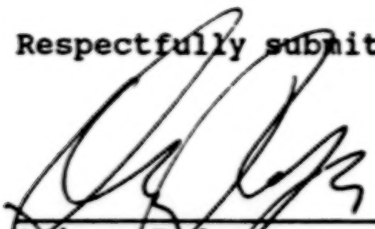
DCR Channel Line Up

Channel 1	Soft Rock
Channel 2	Hit List
Channel 3	Country
Channel 4	Sold Gold Oldies
Channel 5	Urban Beat
Channel 6	Classic Rock
Channel 7	New Age/Contemporary Jazz
Channel 8	Classical Favorites
Channel 9	Classical II
Channel 10	Easy Listening
Channel 11	Big Band/Nostalgia
Channel 12	Love Songs
Channel 13	For Kids Only
Channel 14	Traditional Jazz
Channel 15	Musica Latina
Channel 16	Modern Rock
Channel 17	Hard & Heavy Rock
Channel 18	Contemporary Christian/Gospel
Channel 19	Spectrum

(d) We do not offer "pay-per-listen."

(e) GIC enjoys licensing arrangements with ASCAP and BMI.

Respectfully submitted,



Quincy Rodgers
Associate General Counsel
General Instrument Corporation
1899 L Street, N.W.
Washington, D.C. 20036
(202) 833-9700

Of Counsel:

Elroy H. Wolff
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Jeffrey A. Krauss, Ph.D.
Technical Consultant
17 West Jefferson Street
Rockville, Maryland 20850
(301) 309-3703

Dated: January 15, 1991

Comparison of Adaptive Delta Modulation and Pulse Code Modulation

Adaptive delta modulation is recognized by the International Consultative Committee for Radio (CCIR) as a coding approach for digital audio programming.[1] Pulse code modulation as employed in the DAT standard[2] is also recognized internationally.

However, ADM has two substantial advantages over PCM when used in a transmission system. These are (1) ADM requires a lower data transmission rate than PCM, and (2) ADM performs better when the transmission channel is imperfect and the signal is subject to bit errors. In addition, ADM systems can be less expensive than PCM systems.

The data rate difference can be understood in the following simplified terms. A PCM system samples the audio at a particular constant rate, and then digitally encodes the sample and transmits it. An ADM system also samples the audio, but then compares the sample with the previous sample and need only transmit the information that has changed. Since most audio programming changes slowly over time, less information must be sent to fully describe the audio programming. Consequently, a lower data rate is needed. In addition, with ADM, the sampling rate need not be constant but can be adjusted to optimize the sound quality depending on the frequency range at any particular time.

This reduced data requirement is significant because data rate translates directly into radio bandwidth, and bandwidth is both scarce and expensive. It is possible to provide about three times as many ADM-encoded channels as PCM-encoded channels in a given bandwidth.

The performance difference between ADM and PCM is somewhat more complicated to explain. It derives from that fact that any transmission channel is imperfect, due to various kinds of noise and interference, and a few of the data bits that are received are not precisely the same as those that were transmitted.

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[1] See CCIR Report 953-1, Digital Coding for the Emission of High-Quality Sound Signals in Satellite Broadcasting (15 kHz Nominal Bandwidth), Recommendations and Reports of the CCIR, Volumes X/XI, Part 2, 1986.

[2] International Electrotechnical Commission, IEC 958(1), Digital Audio Interface, 1989.

Bit errors produce different effects in PCM vs. ADM systems.[3] In PCM systems, a bit error can produce an objectionably loud click or pop. In ADM systems, the bit error produces a sound at very low volume levels, so low that it is often masked by the program material. An ADM system can operate acceptably with bit errors up to ten times the level at which a PCM system would become unusable.

The Dolby ADM system has the additional advantage of cost. In this system, the encoder is more complex and expensive, but the decoders are simpler and less expensive. Only limited precision components are required in the decoders, as compared to the higher precision required in PCM decoders to avoid non-linearities or long-term drift. Since the DCR system operates in a point-to-multipoint mode with only one encoder but many decoders for each channel, the simplicity of the decoder brings substantial economic benefits.

In summary, the ADM algorithm is recognized internationally as an acceptable approach for digital encoding and transmission of audio. In contrast, the PCM encoding algorithm described in IEC 958(1), Digital Radio Interface is not likely to be used as a transmission format.

---

[3] This difference is described more fully in S. Forshay, "Economical Digital Audio for Broadcasting," Electronic and Wireless World, May 1987, and C. Todd, "Efficient Digital Audio Coding and Transmission Systems," NAB Proceedings, 39th Annual Broadcast Engineering Conference, 1985.

P.O. Box 150846

NASHVILLE, TENNESSEE 37215-0846

(PHONE) 615-383-7560
(FAX) 615-297-2564

BAYARD H. WALTERS
PRESIDENT

GENERAL COUNSEL
OF COPYRIGHT
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Comment Letter
RM 90-6
No. 15

United States Copyright Office
Library of Congress
Washington, DC 20540

Re: Performances on Sound Recordings Should Not be Copyrighted

THE CROMWELL GROUP, INC.

Dear Sirs:

I am a broadcast station operator in small/medium markets. We pay a fixed percentage of our revenue to ASCAP/BMI/SESAC. It has no bearing on the value of their services to our station, or whether or not we're successful. It's right off the top.

In the case of a performer, they often require a writer to "sign over" the copyright to the performer before they will record the new material. This is with the specific intent of collecting the fees. It is a club often used by successful performers on new and young writers who are trying to "live/eat".

Performers want radio stations to play their music. It gives them exposure and helps sell their records. If you attend any performers meetings, one major topic will always be, "How do I get on the radio?".

The answer is simple. Radio stations sell advertising and virtually any product can be advertised, including the playing of a record. But, performers want radio stations to "play the record for free". Performers don't want to pay to have their record played. However, they want broadcasters to "expose the performer's record for free" plus "pay the performer". Does that make sense? In fact performers should pay ASCAP/BMI/SESAC all the fees for the use of the music. That's as logical as what performers now want to propose.

If you have any questions, please call.

Sincerely,

Bayard H. Walters

Bayard H. Walters
President

WSHY-AM WHAL-AM WYCQ-FM WCTZ-AM WBCM-AM WBCM-FM WEJT-FM WMCI-FM WGLO-FM WVFI-AM

GENERAL COUNSEL
OF COPYRIGHT
JAN 31 1991
RECEIVED

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

Comment Letter
RM 90-6
No. 16

In the Matter of	)	
	)	
Copyright Office Request	)	RM Docket
for Comments Regarding	)	No. 90-6
Digital Audio Broadcast and	)	
Cable Services	)	

REPLY COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA

With few exceptions, the Comments filed in response to the Copyright Office's Notice of Inquiry concerning digital audio broadcast and cable transmissions focused almost exclusively on the impact that these new technologies will have on the home taping problem. Though this focus is understandable given the substance of the questions posed by the Copyright Office,[1] home taping is only a secondary dimension of the challenge presented by digital audio broadcast and

[1] The concerns of the Recording Industry Association of America ("RIAA") relating to the home taping problem and how it is inevitably exacerbated by new technologies that make home taping more convenient and more attractive are well known and have been fully articulated elsewhere. RIAA's proposed solutions to the problem are equally well known. There is no need either to restate them, or to refute the home taping views of others here.

cable transmissions.[2] By far, the central issues are those raised by the performance and electronic distribution of sound recordings by means of digital audio technologies.

Accordingly, the fundamental question raised by these new technologies is whether the U.S. copyright law, and the policymakers who write and administer the law, can continue to tolerate a gaping hole in U.S. treatment of copyrighted works: the absence of a public performance right for sound recordings.

We therefore urge the Copyright Office to address the performance right and home taping issues separately. It should first endorse the "leveling of the playing field" as between sound recordings and other copyrighted works through enactment of a long-needed and deserved performance right in sound recordings. Then, and only

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[2] Although we do not respond in these Reply Comments to the home taping arguments raised by the HRRC in their Comments, we wish to clarify the record on one point made therein. It is not true, as suggested in the Billboard article quoted by the HRRC, that Capitol Records, which plans to offer the Capitol Records Channel through Digital Planet, "is not worried about home taping . . . ." (Comments of HRRC at 8-9, quoting Billboard article.) As Arthur Jaeger, Executive Vice President of Capitol Records, states in his attached letter, Capitol Records remains "acutely concerned about the copyright implications of digital audio broadcast and cable services, including their impact on home taping." In addition, as Mr. Jaeger states, "Capitol Records endorses in the strongest possible terms the RIAA's pursuit of a public performance right for sound recordings."

then, should it address the home taping implications of these new technologies.

With that background, we now respond to several points raised in other comments filed with the Copyright Office. As is discussed in greater detail below:

1. The broadcasting industry undeniably and unjustifiably profits from the use of our members' product without paying for it. It is time to rectify this situation by recognizing a performance right in sound recordings. The Copyright Office should reject NAB's argument that it would be "unfair" to recognize a performance right in sound recordings because it would be too expensive. The broadcasting industry continues to be highly profitable and obviously intends to reap further financial rewards from its development and exploitation of digital audio technologies. It should be required, from the outset of this new era, to pay for <u>all</u> of its inputs, including its principal one, our members' sound recordings.

2. Copyright owners of sound recordings should receive compensation for the public performance of their works regardless of any "exposure" or promotion that broadcasters believe may be afforded by digital audio broadcast and cable services. The broadcasting industry's arguments to the contrary are patronizing and self-serving. The broadcasting industry expects to be paid when others, such as cable operators, profit from the use of their programming. The same equities apply here.

3. It is essential that the Copyright Office consider the impact of digital audio broadcast and cable services on copyrights in sound recordings now, at the beginning of this new era in the electronic transmission and distribution of music, so that they can be integrated into the new digital audio services from the outset.

4. The public interest in preserving access to the information carried in digital subcodes requires legislation mandating their accurate transmission. Further, suggestions that the subcodes would occupy so much bandwidth as to restrict the number of stations that could be licensed are without technical foundation.

I. THE BROADCASTING INDUSTRY PROFITS FROM THE EXPLOITATION OF SOUND RECORDINGS; IT SHOULD BE REQUIRED TO PAY FOR THIS COMMERCIAL USE OF OUR MEMBERS' PRODUCT

For all of its protestations that it would be "unfair" to recognize a performance right for sound recordings, the broadcasting industry cannot dispute the reality that it is profiting handsomely through its use of our members' product, without paying for it. The broadcasters' primary argument before this Office is, in effect, that they cannot afford to pay a performance royalty because, they claim, digital audio broadcast and cable are not likely to be very profitable.[3] Further, they argue, broadcasters would become involved in digital audio broadcasting "primarily as a defensive strategy." (Comments of NAB at 12.) Two responses are in order.

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[3] In fact, according to this morning's issue of Communications Daily, the NAB Radio Board recently stated that "additional copyright payments . . . could result in an irreparable financial burden" to radio stations. "NAB Radio Board Endorses Eureka 147 DAB System," Communications Daily, Jan. 31, 1991 at 4.

First, it is inconceivable that the NAB, its members, and a plethora of other broadcasting and cable constituencies would be devoting so much time and money to develop these new technologies unless the prospects for significant profits were anticipated.[4]

Second, it is not clear what the NAB means by investing in digital audio broadcast services "as a defensive strategy." Presumably, it has something to do with acquiring as much of the available spectrum as possible to prevent new entrants from trying to eat into veteran broadcasters' market share.[5] This would seem to be, at best, mean-spirited and, at worst, problematic from an antitrust perspective.[6]

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[4] Today's issue of Communications Daily, discussing yesterday's meeting of the NAB Radio Board, also reports that: "If all things go as planned, NAB Technologies (profit-making arm of nonprofit association) will obtain N. American rights to Eureka 147 [a European digital audio broadcasting system] and will license them to radio stations." Id. So much for not intending to profit from DAB technologies.

[5] Incidentally, broadcasters currently "acquire" this valuable and limited spectrum -- an important public resource -- for free.

[6] Equally troublesome, though predictable, is a recent report that "NAB's Digital Audio Bcstg. [sic] (DAB) Task Force is expected to ask NAB board this week to 'embrace DAB technology, attempt to manage and control its implementation, and then actively support implementation of DAB technology on terms the industry would find minimally disruptive.'" "DAB, Cable Tops at NAB," TV Digest, Jan. 28, 1991 at 3. One key part of the plan "is convincing the FCC and the radio industry that satellite delivery of digital audio should be

[Footnote continued on next page]

The Copyright Office should be equally dubious about arguments concerning the unprofitability of the broadcasting industry. In the first place, their alleged poverty doesn't excuse them from their obligation to pay for all their other costs of doing business -- for rent, disc jockeys, news services or staff. Why should their principal programming material be treated any differently? In the second place, radio's share of advertising revenues has, in fact, steadily increased over the past several years -- it was projected to total $8.8 billion in 1990 -- and is projected to continue to grow.[7] Moreover, even the NAB concedes in its comments that "the average radio station" was, in fact, profitable in 1989. (Comments of NAB at 13.)

The broadcasters' argument that a performance right for sound recordings is unjustified because they "already pay" performance royalties to composers and music publishers is especially specious and misleading. It is like arguing that "because I paid the electric

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[Footnote continued from previous page]
blocked . . . ." "DAB Strategy," Broadcasting, Jan. 28, 1991 at 53. Apparently, another element is to ensure that the broadcasters' costs for programming material on the new digital stations is kept to an absolute minimum -- by not having to secure licenses to publicly perform the sound recordings they broadcast.

[7] See "Radio Increases Revenue Share," Broadcasting, Dec. 17, 1990 at 53.

bill this month, I shouldn't have to pay the gas bill."[8] The broadcasters' payment of royalties to one group neither diminishes nor excuses the inequity of the absence of a performance right for those who invest substantial revenues in bringing prerecorded music to the public.[9]

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[8] Equally irrelevant is the NAB's argument (at p. 15) that a performance right in sound recordings is unjustified because "most recording companies have music publishing subsidiaries which already receive royalties from broadcasters for public performance and synchronization rights." The coincidence of corporate ownership that links some, but not all, recording companies to the music publishing industry is beside the point and does not, in any event, recognize the contributions of artists and musicians in creating sound recordings. The products of the two industries are distinct works for purposes of copyright law; the exploitation of each should entitle the owner to compensation. To suggest otherwise would be like an advertiser claiming that the price it paid for commercial time on network television should cover commercial time on a radio station owned by the same network as well.

[9] Some of the comments submitted also reflect a fundamental misunderstanding of who currently benefits from a performance right. These commenters incorrectly assume that copyright owners of sound recordings, artists and musicians receive performance royalties under the current system. (See Comments of Strother Communications, Inc. at 2; Comments of CD Radio, Inc. at 3.) As the Copyright Office well knows, only composers and music publishers share in the revenues derived from the public performance of musical works; sound recording copyright owners, artists and musicians receive no compensation for public performances of their works.

II. SOUND RECORDING COPYRIGHT OWNERS DESERVE COMPENSATION FOR THE COMMERCIAL EXPLOITATION OF THEIR WORKS, REGARDLESS OF THE "ENHANCED EXPOSURE" THAT THE BROADCASTING INDUSTRY ASSERTS WILL BE AFFORDED BY DIGITAL AUDIO BROADCAST AND CABLE SERVICES

In seeking to divert attention from the inequity of their unpaid-for exploitation of the recording industry's product, the NAB argues that we should welcome the advent of digital audio broadcast and cable, without a public performance right, because of the great promotional boost that will be provided for our members' works by these new technologies. The Copyright Office should recognize this patronizing, self-serving attempt to dismiss our concerns for exactly what it is -- a bald attempt to continue to secure its key programming component for free.

First, it is an argument that the broadcasting industry itself rejects when its own ox is being gored. For years, the broadcasters railed against the "unfairness" of cable retransmission of broadcast programming despite the cable industry's position that they were helping broadcasters by enhancing and enlarging their commercial advertising coverage areas. In 1976, broadcasters fought for and won an extension of the public performance right, by way of a compulsory license, to compensate for the commercial expropriation of distant signal programming by cable television.

In that context, during the legislative hearings preceding copyright revision, Robert V. Evans, then Vice President and General Counsel of CBS, Inc., said, "it is unreasonable and unfair to let [the cable] industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America."[10] Ironically, substituting "the digital audio broadcast" industry for "the cable industry" in this testimony frames the digital audio broadcast/cable issue perfectly from the perspective of the recording industry. The absence of a performance right in sound recordings, when these works are similarly exploited, offends our sense of the way things ought to work in America, particularly when compared to how sound recordings are treated in most developed countries throughout the world.[11]

In recent years, the broadcasting industry has gone even further to protect its interests against what it perceives as the "freeloading" of the cable industry. It is now pressing for legislation to require the cable industry to pay for the retransmission of local signals.

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[10] Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 769 (1975).

[11] The international ramifications of the absence of a U.S. public performance right for sound recordings were explored in our Initial Comments.

Under the banner "if carry, must pay," the broadcasting industry has complained, through NAB President Eddie Fritts, that "[c]able operators take a broadcaster's signal and in turn sell it to a consumer for a profit and pay nothing to the broadcaster for the use of that signal. On the other hand, cable systems pay all the cable networks a fee for a similar type of service. This inequity is something that broadcasters recognize . . . ."[12] Apparently, the broadcasters' ability to focus on inequity is somewhat myopic and does not reach beyond the confines of their own backyard. We find their arguments on this score unpersuasive and disingenuous. Moreover, a similar disparity of treatment could be seen through broadcasters' own use of music videos, which are subject to a public performance right, and sound recordings, which are not.

Second, even if the broadcasters were correct that enhanced exposure through digital audio broadcast and cable services will increase record sales, that still would not diminish our members' entitlement to a separate stream of compensation from the broadcasters for their commercial exploitation of sound recordings. The implausibility of the broadcasters' logic is shown by trying to transfer the argument to other copyrighted

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[12] "This Year Should Be Busy One in Washington," Broadcasting, Dec. 31, 1990 at 39.

works. No one would seriously argue that CBS would have been entitled to produce and air a televised version of Lonesome Dove without compensating Larry McMurtry, the author of the novel, on the theory that sales of the book probably would increase as a result of the broadcast exposure. Moreover, when the identical sounds embodied in our members' sound recordings are instead included in music videos, these music videos enjoy a full and exclusive public performance right. Music videos may be said to promote record sales, too, but the law is clear that owners of the copyrights in those music videos are entitled to control the public performance of their works just like the owners of every other copyrighted work -- except, of course, sound recordings.

Finally, the "exposure" argument simply does not hold water in the context of digital audio broadcast and cable services. Since the services, in effect, may substitute for sales of prerecorded music, they cannot plausibly be claimed to stimulate purchases.[13] These services essentially deliver the music to the home for immediate "consumption."

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[13] For example, Digital Cable Radio describes itself as "a commercial-free premium audio service delivering CD-quality sound programming 24 hours a day . . . . DCR delivers to consumers audio sound quality equivalent to that produced by compact discs . . . ." (Comments of General Instrument Corp. at 2.)

Some services also state that they intend to air less popular works that are not generally broadcast on conventional radio stations. The sales demand for "less popular" prerecorded music is, by definition, limited. There is thus a significant risk that services that meet the listeners' demand for such music may dampen the already limited demand for record purchases. In these instances, every "exposure" -- rather than presenting an opportunity to entice a listener to buy the record -- could make a sale less likely.

In short, the NAB "exposure" argument is itself "overexposed." The Copyright Office should recognize it for what it is: a tired and impoverished rationalization for the broadcasters' commercial exploitation of our members' product without compensating them for its use.[14]

III. IT IS ESSENTIAL THAT THE COPYRIGHT OFFICE CONSIDER THE IMPACT OF DIGITAL AUDIO BROADCAST AND CABLE SERVICES ON COPYRIGHTS IN SOUND RECORDINGS NOW, SO THAT SUCH CONSIDERATIONS CAN BE TAKEN INTO ACCOUNT FROM THE BEGINNING OF THIS NEW ERA IN THE ELECTRONIC TRANSMISSION AND DISTRIBUTION OF MUSIC

Contrary to the assertions of some of the commenters, it is not premature to consider the impact

[14] Of course, the "exposure" argument also is inconsistent with the fundamental rights of copyright owners to themselves determine how best to bring their works to the public.

of these new technologies on copyrights in sound recordings. There is no good reason -- only poor excuses -- as to why the Copyright Office should or must wait either for the Federal Communications Commission to finalize the technical parameters of the new digital audio broadcast services, or for the digital cable services to complete their testing and development work, before it addresses their copyright implications. It is not as if there remains some doubt that these services are on their way to public introduction; the broadcasters themselves acknowledge that it is only a matter of time.[15] Digital cable services will soon be a commercial reality. Therefore, it is not only prudent but imperative for the Copyright Office to think ahead now, while time is still available and the results of its efforts can be taken into account in the business and engineering plans of the new services.

This is both efficient, from a planning perspective, and fair, from the perspective of commercial and consumer expectations. If, as we vigorously contend, copyright and fairness

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[15] According to recent reports, a CBS spokesperson called the arrival of digital audio broadcasting "inevitable" and said that the network was working on development of a terrestrial system to be completed in time for the 1992 World Administrative Radio Conference. "CBS Trying to Develop Terrestrial DAB System in Time for WARC," Communications Daily, Jan. 24, 1991 at 3.

considerations necessitate new rules for the digital audio broadcast/cable era,[16] it is best to establish and follow those rules from the outset.

Even the broadcasters and others who advocate a "wait and see" approach appreciate that this is so. It

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[16] Curiously, though not surprisingly, there seem to be two stories concerning whether digital audio services really mark a "new era"; industry sources apparently use whichever story is most convenient to serve the purpose at hand. When trying to persuade regulators that they should be able to exploit our members' product through these new services without paying for it, these enterprises argue that:

> Digital audio broadcast and cable services are not sufficiently different from other modes of music transmission or reproduction to justify different treatment under the copyright law.

Comments of General Instrument Corporation, corporate parent of Digital Cable Radio, at 4-5. But when trying to tout its new service, Digital Cable Radio states, in contradiction to General Instrument Corporation's comments, that:

> We're a different animal than radio . . . . We deliver product directly to people. Radio delivers people to advertisers. There's little commonality.

"Cable Audio Services Dialing for Dollars," Billboard, Jan. 26, 1991 at 19, 23.

Similarly, Digital Music Express claims:

> We don't even think of this as radio . . . . We are a new way of listening to music . . . . The only component we have is music. [We are] 100% pure compact disc [sound] with no other resemblance to radio.

Id.

is for that very reason that they urge the Copyright Office to refrain from acting in hopes that the rules of analog broadcasting will become the status quo of the digital era.

It does not take a crystal ball to predict what all of these groups will be saying in six or seven years after digital audio broadcast and cable services have become a fact of life in the U.S. -- after we have heeded their "wait and see" advice: They will then argue, no doubt, that the expectations of consumers, digital cable and broadcast services, and their related constituencies, are so firmly fixed that it would be unfair to "change the rules" at that point.

The Copyright Office should resist the efforts of those who want to have it both ways -- to prevent early, prudent consideration of the copyright implications of new technologies as "premature" and then to block later adjustments as being "unfair."

IV. THE PUBLIC INTEREST IN PRESERVING ACCESS TO THE INFORMATION CONTAINED IN DIGITAL SUBCODES REQUIRES MANDATORY TRANSMISSION OF DIGITAL SUBCODE INFORMATION

RIAA urged, in its December 14, 1990 submission, that the Copyright Office propose legislation requiring the mandatory transmission of digital subcode

information in sound recordings.[17] The digital subcodes are an integral part of the copyrighted sound recording. They carry a wealth of information about the sound recording, such as its copyright status, the identity of the recording artist, and the record label that produced the recording. The RIAA advanced this proposal as a way of ensuring that digital audio broadcast and cable services, as well as the home receivers for these services, are engineered to preserve for the listening public all possible opportunities for the transmission of valuable program-related information.

We seriously doubt that these obvious benefits to consumers have been lost on the commenters who oppose requiring the transmission of subcode information. Rather, they reject this sensible requirement of a standardized technological capability because they fear its potential use for purposes they deem objectionable -- namely the collection of home taping royalties. We suggest that the benefits of the subcode baby should not be thrown out with the home taping bath water. Consumers of digital audio services in the future should not be denied the opportunities that

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[17] Likewise, in our comments to the Federal Communications Commission on digital audio broadcast services, we advocated implementation of an FCC rule to the same effect.

increased information capacity can bring because of the hidden political agendas of the commenters today.

Contrary to the suggestions of certain commenters, the transmission of these subcodes would not occupy so much bandwidth as to restrict the number of digital audio broadcast stations that can be licensed.[18] Assuming a user subchannel data rate of 1,000 bits per second, which is the rate that is contemplated for some systems already under review, only 0.4% of the 250 kilobits per second data rate for the proposed digital broadcast channel would be used.[19]

Moreover, digital broadcast systems will use only a small fraction of the spectrum now used by AM and FM broadcasters. Therefore, in any event, a far greater

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[18] We note the tentativeness with which the NAB advances this argument, stating that mandatory transmission of digital subcode information "could possibly reduce the number of stations capable of broadcasting in digital." (Comments of NAB at 17 (emphasis supplied).)

[19] One commenter, General Instrument Corporation, states that the transmission of digital subcode information would require technical changes to their equipment. Such arguments are commonly raised before such standards-setting bodies as the FCC in an effort to discourage the establishment of standards that jeopardize one's own proposed system. In raising that argument here, however, General Instrument Corporation misses the point of this proceeding: to determine whether certain technological standards may be appropriate to respond to the copyright implications of the new digital technologies at the outset of the new services, so as to avoid wasted investments in technology that is superseded by later changes in the law.

number of digital audio broadcast allocations will be available even if all are required to carry sound recording digital subcode information.

CONCLUSION

For all of the reasons stated in RIAA's December 14, 1990 submission and in these Reply Comments, it is imperative that the Copyright Office move forward expeditiously with its study of the copyright implications of the new digital technologies. We therefore urge the Copyright Office to go to the very heart of the problem by recommending legislation to remedy the fundamental inequity of our copyright law's treatment of works to be commercially exploited by digital audio broadcast and cable services -- the absence of a public performance right in sound recordings.

Respectfully submitted,

David E. Leibowitz
Senior Vice President
and General Counsel
Recording Industry
Association of America
1020 19th Street, N.W.
Washington, D.C. 20036
(202) 775-0101

January 31, 1991

ATTACHMENT

Arthur Jaeger
Executive Vice President

January 29, 1991

David E. Leibowitz
Senior Vice President and
General Counsel
Recording Industry Association
of America
1020 19th Street, N.W.
Suite 200
Washington, D.C. 20036

Re: **Digital Audio Broadcast/Cable**

Dear David:

I am writing to correct certain misunderstandings that were engendered by a recent Billboard article in which I was quoted concerning Capitol Records' arrangements with Digital Planet, a new cable music service. I was paraphrased as saying that home taping in the digital audio broadcast/cable domain "should not be any more extensive than current home taping off of radio programs." What I actually said, taken in context, made it perfectly clear that, in our arrangement with Digital Planet, we have taken many careful steps to minimize incentives for extensive home taping and that we hope we have been successful in not making the problem any worse than it currently is with current broadcast formats.

Specifically, our programming will not involve cable transmission of entire albums, which could be an inducement to home taping. Our programming will be more like current analog radio broadcasting: it will include interviews, comments, station identifications and front and back announcing. No more than three songs will be played in succession. Further, we have asked Digital Planet not to publish a detailed program guide for our programming, and the programs will be timed to start a little before or after each hour or half hour to further discourage their easy access for home taping.

Capitol Records, Inc.
1750 North Vine Street
Hollywood, CA 90028
(213) 871-5717
Fax (213) 466-1004

BEST COPY AVAILABLE

We agreed to work with Digital Planet in the first place only because the company has expressed a willingness to work with us to develop an acceptable way of addressing our copyright concerns. We have agreed only to be part of an initial testing phase of Digital Planet's debut which will involve no more than 600 homes. We will evaluate the results of this initial phase very carefully to determine whether and how we will be involved beyond the testing phase.

I hope that the foregoing clarifies the nature of Capitol Records' participation in the Digital Planet venture. Contrary to the implication of the Billboard article, we remain acutely concerned about the copyright implications of digital audio broadcast and cable services, including their impact on home taping. Moreover, in case it is for some reason not clear, let me assure you that Capitol Records endorses in the strongest possible terms the RIAA's pursuit of a public performance right for sound recordings. It is a vital component of the record industry's future in digital broadcasting and other new technologies.

Very truly yours,

ARTHUR JAEGER

AJ:md

CERTIFICATE OF SERVICE

I, Kathleen M.H. Wallman, do hereby certify that the original and ten true and correct copies of the foregoing "Reply Comments of the Recording Industry Association of America" were delivered by hand, on this 31st day of January, 1991, to the following:

The Honorable Ralph Oman
Register of Copyrights
Copyright Office
James Madison Memorial Building
First & Independence Ave., S.E.
Washington, D.C. 20540

Kathleen M. H. Wallman
Kathleen M.H. Wallman

GENERAL COUNSEL
OF COPYRIGHT
JAN 3 1 1991
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Comment Letter
RM 90-6
No. 17

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	
Digital Audio Broadcast	)	Docket No. RM 90-6
and Cable Services;	)	
Copyright Office Study	)	

REPLY COMMENTS OF COX BROADCASTING

Cox Broadcasting, a division of Cox Communications, Inc. ("Cox")[1/], by its attorneys, hereby submits these Reply Comments in response to the Copyright Office's Notice of Inquiry, 55 Fed. Reg. 42, 916 (Oct. 24, 1990)(the "Notice"), in the above-captioned proceeding. The Notice seeks comments on whether digital audio broadcasting ("DAB") will have an adverse impact on copyright owners, and whether it is necessary to adopt new methods of compensating copyright owners.

As discussed in more detail below, Cox endorses the Comments filed by the National Association of Broadcasters (the "NAB"). Moreover, it is premature to speculate on any possible adverse impact DAB technology may have on copyright owners of musical works, or to require broadcasters to pay any royalties in

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1/ Cox is a media company that owns and operates, inter alia, seven (7) television and fourteen (14) radio broadcast stations throughout the United States.

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addition to those substantial royalties already paid to copyright owners through performing rights societies.

DISCUSSION

The recording industry has urged the Copyright Office to initiate this proceeding based upon its fear that DAB technology will increase the incidence of off-the-air home taping of copyrighted musical works and thus significantly reduce the market for prerecorded music. See Comments of the Recording Industry Association of America (the "RIAA"). Indeed, the RIAA has been forecasting the demise of the recording industry, and the decline of the market for prerecorded music, since the advent of the tape recorder and the ability of home listeners to tape music off-the-air and from other prerecorded formats. See, e.g., U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, D.C., U.S. Govt. Printing Office, October 1989) pp. 37-38, 75-77, and 78-81. Digital technology is simply the newest of such technologies. The recording industry has been unable to demonstrate any significant adverse impact on copyright owners from home taping. In fact, there is a strong argument that off-the-air taping encourages sales of prerecorded music. And while Congress has in the past considered adopting a plan similar to the one urged by RIAA, such a scheme has been rejected as unnecessary and unwise. See, H.R. Rep. No. 92-487 at 7

(1971). The recording industry's unfounded fears should not now result in the adoption of additional royalty requirements or other regulatory burdens for broadcasters.[2/]

As the NAB's Comments aptly point out, even if the recording industry were able to demonstrate convincingly that DAB technology would result in reduced sales of prerecorded music, broadcasters neither encourage nor benefit from off-the-air taping. NAB Comments at 11-14. Instead, listeners who tape music off-the-air play it back at times when they might otherwise be tuned in to radio or television broadcasts. Thus, rather than add to broadcast station revenues, DAB technology could reduce broadcast audiences and therefore ultimately reduce revenues. Accordingly, the imposition of additional royalties on broadcasters to compensate copyright owners for revenues allegedly lost as a result of the new technology would be a gross inequity.

Cox contends that no regulation is necessary or appropriate at this time. If the Copyright Office does determine, at some future time, that regulation is appropriate, it would be preferable for the Copyright Office to adopt a

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2/ In addition, the Copyright Office should dismiss any suggestion that it impose regulations restricting the number of musical selections a broadcaster may broadcast from an album within a given time frame. Not only would such a regulation run afoul of broadcasters' first amendment rights, but it would unnecessarily intrude into the traditional formats adopted by the broadcasting industry.

regulatory scheme that requires digital audio tape ("DAT") recorders to include a feature that limits the number of copies that an individual can make from prerecorded master tapes. Rather than penalize broadcasters for adopting an advanced technology that improves the quality of broadcast service, such a system would effectively limit home taping without imposing unduly burdensome requirements on non-infringing services and users.

Finally, Cox urges the Copyright Office to dismiss out-of-hand any regulatory scheme that would require digital audio broadcasters to encrypt their signals, and thus render digital audio broadcasting a "pay," rather than free, service. An encryption requirement would result in limiting the public's access to DAB technology, and have far-reaching impact on the underlying nature of this nation's broadcasting system.

CONCLUSION

For the reasons set forth above, it is premature for the Copyright Office to adopt a new regulatory or royalty scheme to compensate for purely speculative losses that may result from the employment of DAB technology. In the event that the Copyright Office finds it necessary to make changes to the present scheme, Cox urges that the Copyright Office preserve the present regulatory system as it is applied to broadcasters, and

focus its attention and efforts instead on formulating requirements to be applied to DAT technology.

Respectfully submitted,

COX BROADCASTING, a division of
COX COMMUNICATIONS, INC.

David J. Wittenstein

By: David J. Wittenstein
Jodi B. Brenner

Its Attorneys

DOW, LOHNES & ALBERTSON
1255 Twenty-third Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

January 31, 1991

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Before the
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In the Matter of:	)	
Digital Audio Broadcast and Cable Services	)	Docket No. RM90-6

REPLY COMMENTS OF BROADCAST MUSIC, INC.

In accordance with the Copyright Office's Notice of Inquiry dated October 24, 1990, in the captioned proceeding, 55 Fed. Reg. 42,916 (1990), Broadcast Music, Inc. ("BMI") hereby submits its reply comments in response to the initial comments filed by the National Association of Broadcasters ("NAB"), and the Home Recording Rights Coalition ("HRRC").

A. It Is Not Premature for the Copyright Office to Make Recommendations to the Congress to Amend the Copyright Act in Regard to the Treatment of Works of Copyright Owners Transmitted by Over-the-Air Broadcasters.

In its comments, the NAB states that since the equipment necessary for broadcasters to transmit or receive digital audio signals is not yet commercially available, and there is no current accurate assessment of the costs of such technology, consideration of the entire issue of copyright owners' rights is

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premature.[1/] The NAB is flatly wrong. To the contrary, BMI believes that an unwarranted delay in addressing the copyright issues raised by DAB services would be devastating to the marketplace for music in the United States in years to come.

DAB technology is here. DAB signals produce a quality of audio signal that is superior to the analog signals currently transmitted by broadcasters and cable operators. As evidence of this superiority, one need only visit any record store to see the dearth of vinyl records as compared to CDs on sale. Obviously, consumers have embraced the enhanced sound quality of compact discs in great numbers, with no movement afoot to bring back the vinyl record.

It is also clear, as the Roper Organization's study evidences, that audiophiles are anxiously awaiting the availability of digital audiotape ("DAT") recorders so they can make equally high-quality tapes.[2/] There is no question that once the FCC makes DAB services available in every home, the ease of access to digitally recorded music will encourage consumers to make home tape recordings and thereby avoid a trip to the record store. As the Notice of Inquiry points out, three cable systems

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1 Comments of the National Association of Broadcasters ("NAB Comments"), at 4-6.

2 The Roper Organization Report on Home Audio Taping and Projected DAT Use, June 1990, at 13. A lawsuit is pending against the manufacturers of such equipment on the grounds of, inter alia, contributory infringement of copyright.

in the United States are already testing DAB services. 55 Fed. Reg. 42,916.

Although the initial focus of DAB delivery is on satellite and cable transmission, to wait to adopt copyright protection for terrestrial systems, as the NAB suggests, until those systems are "up and running" is to fail to meet the challenge posed by this new technology. This technology is literally on our doorstep, and the only issue is the implementation of DAB services in the United States.

Over-the-air broadcasters would react to any DAB success in other transmission media by pressing hard for its use in their terrestrial systems. The technology needed to do that could be introduced much faster than copyright owners could expect the Copyright Office and Congress to undertake another major remedial examination of an already-addressed issue, albeit in a different context.[3/] Introducing a sophisticated system such as DAB to the consumer without any provision for a royalty is folly. After two or five or ten years a new technology becomes

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3 In its Petition for Rulemaking dated July 26, 1990 before the Federal Communications Commission ("FCC Petition"), which is attached to its Copyright Office Comments, Strother Communications, Inc., which labels itself as the leading proponent of over-the-air digital broadcasting, indicates that the technology for DAB terrestrial broadcasting already exists, and the introduction of such a system in Europe and Canada is likely in the near future. Strother FCC Petition, at 4. Such facts conclude that adoption of a DAB terrestrial system in the United States could move quickly.

entrenched and customers know what to expect. To adjust the legal system by instituting a royalty factored into price or usage at a later date will be exceedingly costly to the businesses earmarked to collect and distribute the royalty as well as to the manufacturers and distributors of the equipment who have to charge the royalty and upset consumer expectations.

Congress is not likely to expand a right when such an expansion would interfere with customary activity that has come to be expected by its constituents. It is vastly preferable to create new ground rules in a marketplace before business decisions are made and resources are allocated. The introduction of new technology has always been the engine driving the growth of the copyright law. The challenge to lawmakers presented by DAB services is no different. The time to act is now, when all the DAB systems are in their infancy, and the entire issue of rights owners of sound recordings and musical compositions - which would not change with the method of delivery - can be addressed together.

B. Home Taping Without Remuneration to Copyright Owners Is Not "Sound Public Policy" in the 1990's.

Both the HRRC and the NAB indicate that Congress, in passing the Sound Recording Act of 1971, stated that home taping

was sound public policy.[4/] However, those statements, which were made over 20 years ago, do not reflect current realities. In 1971 the sophistication of home recording technology available, the cost of delivering music to the private consumer, and public attitudes about home taping were all vastly different than they are today with the advent of DAB. Compact Discs did not exist in 1971. The popularity of inexpensive home-based recording equipment that could make copies of copyrighted works with little trouble, as VCR's do, was minimal. Although Congress evidently may have believed that home taping was acceptable in certain circumstances 20 years ago, the technological revolution that has occurred since 1971 is cause for this reasoning to be thoroughly reexamined. In view of this, the home taping of music provided by DAB services without remuneration to copyright holders no longer is "sound" public policy in the 1990's.

C. Emerging Technology Is Likely to Make the Availability of DAB Services So Widespread That Home Taping Will Flourish.

The NAB and HRRC have asserted that copyright owners exaggerate the problems posed by home taping. They rely almost exclusively on the OTA Survey to support their conclusion that home taping is not a significant problem. However, that survey

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4 See Comments of the HRRC ("HRRC Comments"), at 14-15; NAB Comments, at 6-7.

did not sufficiently consider the impact of DAB services on taping practices. Thus, the OTA Survey is not probative, and should be discarded. In a DAB world, the incentives to tape at home will increase exponentially, as the Roper Organization's Study confirms. That world is approaching at a rapid pace.

In its comments, Strother Communications, Inc. asserts that in the not too distant future, "[a]ll radio stations would operate on a single band, would have identical sound quality, and would be guaranteed coverage of their DAB market areas. . . . The public will no longer have to rely on home audio equipment for near-perfect sound reproduction. Instead, CD/DAT-quality, interference-free reception of all radio stations in a market will be possible both at home and on the highway. New receivers will, of course, be required to take advantage of DAB's improved sound quality. . . . [O]nce mass production of DAB receivers begins, their cost will quickly become comparable to the price of AM/FM radios today."[5/]

The picture that Strother paints is both realistic and unnerving to copyright owners. Technology available today will move so quickly into the marketplace that DAB service programmers will have to rush to keep pace with their listeners' demands.

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5 Strother FCC Petition, at 9-10.

The NAB asserts that the reason there is "so little" home taping of pre-recorded music off-the-air is "time, inconvenience and advance planning."[6] Yet NAB's only support for this statement is an appeal to "logic." Id. To the contrary, it is clear that the economic incentive to tape CD quality music at home, combined with the ease of access provided by digital technology, refute the NAB's argument that home taping is time-consuming and inconvenient.

The HRRC likewise asserts that "[t]aping music from the radio is time-consuming, inconvenient and tedious. . . . Consumers rarely know when a station will broadcast the music they wish to tape. . . ."[7] None of these reasons will apply to DAB services. Later in its comments, the HRRC admits that the reasons given by home tapers for taping are "convenience of portability, longer playing times, durability and personalized selection of music."[8] With respect to personalized selection of music, it is disingenuous for HRRC to assert that homemade tapes "do not compete in the marketplace with copyrighted works and therefore do not devalue copyrighted works in any way."[9] To the contrary, there is at least one service available,

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6 NAB Comments, at 10, n.17.

7 HRRC Comments, at 11.

8 Id., at 18.

9 Id.

Personics, which will directly compete with home taping of DAB services. Personics provides consumers the opportunity to make customized tapes in a record store from a selection of titles for which mechanical license rights have been cleared with the copyright owners. A home-available system allowing customized selection of music would be in direct competition with services such as Personics, but would include none of the licensing arrangements. Clearly, selectivity is one of the many incentives to create home tapes from DAB services. Moreover, the fact that home tapers may have certain reasons for taping in no way justifies their contravening copyright rights.

The HRRC also justifies home audio taping by pointing to the decision in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).[10/] Their reliance on Sony as analogous is misplaced, however. Sony addressed the issue of home videotaping from the point of view of the equipment and the programming being taped. Unlike the video taping of programs broadcast on only a few channels and not available elsewhere, music programming on radio consists largely of recordings available for retail sale. Thus the factor of competition between taped broadcasts and retail sales becomes important, directly affecting the value of the work in the marketplace.

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10 HRRC Comments, at 17.

A more significant incentive is that programming changes for radio are certain to be imminent once DAB receivers become available. Program guides will become as ubiquitous for radio as they now are for television. In the same way one can look up a favorite television program in TV Guide or a cable guide and program the VCR to record the show for later viewing, one will soon be able to look up favorite pop songs in a DAB Radio Guide. Consumers can set a technologically proficient receiver to record the pre-selected songs and leave the house while the recording is in process. It will thus no longer be time-consuming, inconvenient or tedious to create personalized tapes. These tapes surely will be as durable as the CD available at the record store. If the price of DAB services subscription is low enough, there will no longer be a compelling reason to purchase pre-recorded music. Not to have a remuneration factor for the owners of the music in this scenario is to bury copyright principles of reward for creativity along with the outmoded analog technology.

D. Contrary to the Assertions of the HRRC, Compensating Creative Artists by Levying a Royalty on Blank Tape and/or Recording Equipment Is Not Unfair to Consumers and Will Compensate and Encourage Artists.

The HRRC asserts that a royalty on blank tape or recording equipment is unfair to consumers who use their equipment only for playback.[11/] However, these consumers will not be affected at all by a blank tape royalty since they presumably would have no reason to buy blank tapes. Moreover, the cost of the recording equipment capable of making CD-quality tapes in the home is not appreciably affected by the levy of a few additional dollars to compensate copyright owners.

Further, HRRC states that "the distribution of royalty tax revenues would not serve the avowed purpose of compensating and encouraging artists".[12/] In support of that statement, the HRRC points to, among other things, BMI's overhead costs as reducing "the slice of the pie" to songwriters and performers. HRRC's comments reflect a basic misunderstanding of the music industry. BMI traditionally has had administrative costs among the lowest in the world for an operation of its kind. It is not likely that a new royalty distribution mechanism could be created on a national scale that would incur significantly lower costs than those expended by the long-running operations of performing rights organizations.

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11 HRRC Comments, at 39.

12 Id., at 41.

Also, the HRRC erroneously equates copyright rights with modest business success, stating that multinational conglomerates which own record companies are somehow not worthy of compensation. According to the HRRC, the conglomerates may not adequately remunerate the less financially secure copyright owners that they represent.[13/] The Copyright Act does not adjust the scope of a copyright according to the financial status of the rights holder, however. Indeed, to do so would be completely antithetical to the fundamental principles of copyright law. By employing what amounts to a "means" test, the HRRC suggests that the major music publishers, who share mechanical royalties with the creative artists, should perhaps be deprived of compensation rights for re-recording of their copyrights, merely because the publishers are often owned by large companies. The HRRC implies that copyright royalties should not inure to successful writers or artists because they are already "reaping the greatest . . . profits."[14/] This argument stands the constitutional incentive for creativity on its head (compensation is intended to encourage productivity and guarantee the opportunity to achieve financial success). In short, the HRRC's arguments reflect a complete misunderstanding of bedrock principles of copyright law.

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13 Id. at 41-42.

14 Id., at 42.

E. Providing No Remuneration to Owners of Pre-recorded Music Undermines the United States' Position As a Major Exporter of Music and As a Member of the International Copyright Community.

The recent accession of the United States to the Berne Convention was prompted as much by our need to speak with a more credible voice in the international copyright community as by our need to obtain increased protection for our copyrights around the world. Many nations of the world already collect royalties for home taping, through a levy on either blank tape or recording equipment, or both, among them being France, Germany, Spain and Portugal.[15/] At the moment, U.S. copyright owners receive a share of these royalties for their works which were copied. However, Australia and Finland have already decided to exclude from their distributions countries that do not reciprocate in this area. Other countries are sure to follow suit if they see further reluctance of the United States to join them in this additional level of compensation for creators and rights owners. As DAB moves toward worldwide acceptance and the United States public embraces it, the likelihood is that American creators will suffer increased losses.

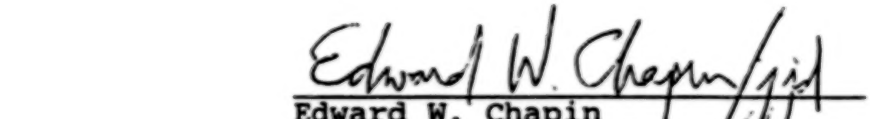
15 BIEM Report, January 1990, Exhibit B to the Comments of the Copyright Coalition.

F. Conclusion.

Never has the copyright community stood on the brink of a technological revolution that threatens to undermine the very principles for which copyright was created. The popularity of the Compact Disc, which has supplanted and practically destroyed vinyl recordings, is about to be brought into the home on a receiver that one day soon will be able to be purchased for a few dollars, one that will be able to record broadcast songs in any order while the taper is away from home. He will be able to amass libraries of these customized tapes with the same quality of sound that he could get if he bought a CD. So why should he bother to purchase a recording? He can become his own record manufacturer instead - except that record manufacturers are required by copyright law to pay copyright owners mechanical royalties, and he's not. Therefore, Congress must realize the potential for damage of the copyright system they have so carefully tried to establish, and impose a royalty on the things needed to make home tapers into record-makers. Congress should act now, before the users of this fantastic new technology refuse to tolerate any adjustment in their way of life later. Only by addressing the issues before the technological explosion occurs will we be able to insure that the creators of music and

owners of copyrights are not short-changed to such an extent that their investment in the future creation of American music becomes too unrewarding to continue.

Respectfully submitted,



Edward W. Chapin
Vice President and General Counsel
Broadcast Music, Inc.
320 West 57th Street
New York, N.Y. 10019
(212) 586-2000

January 31, 1991

GENERAL COUNSEL
OF COPYRIGHTS
JAN 31 1991
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Comment Letter
RM 90-6
No. 19

IN THE UNITED STATES COPYRIGHT OFFICE

Response to Notice of Inquiry:	)	
	)	Docket No. RM 90-6
Digital Audio Broadcast and Cable Services	)	

To the Honorable Ralph Oman, Register of Copyrights:

REPLY COMMENTS OF THE
HOME RECORDING RIGHTS COALITION

In its initial Comments to the Copyright Office, the Home Recording Rights Coalition ("HRRC") made five essential points:

1. There is no evidence that digital audio broadcasting ("DAB") will "prompt" or otherwise cause any listener to change home taping practices, so monitoring or technological restrictions on recording -- even if acceptable to the public -- are unnecessary.

2. Home taping from DAB would not, on balance, displace album sales, just as other forms of home taping do not, on balance, displace sales. Home taping tends to stimulate sales, as OTA confirmed.

3. Copyright holders will benefit handsomely from DAB, just as they have with every other technological advance in home entertainment; and are developing effective commercial means of licensing their works, in the absence of mandatory government restrictions.

4. Royalty taxes for home taping, whether collected through high-tech monitoring devices or old-fashioned taxation, remain unwarranted and unfair and would impose undue costs on all consumers whether they tape or not.

5. Mandatory DAB scrambling and conditional access for recorders would "fix" two systems that are not broken. The market for broadcast radio would be ruined by scrambling, and the extra, extra charge for recorder operation would add insult to injury.

Commenters representing some in the recording and music industries express fear that DAB will do what no prior technology has done -- that is, that it may harm, rather than promote, these

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industries. They seem to believe that new royalty taxes provide the only answer. Yet, it seems, they cannot agree on who to tax, where to tax, what to tax or how to tax. The only common thread is the desire to tax, upon the false premise that digital technology somehow will drastically alter human nature and home taping habits.

But, as HRRC and other commenters have demonstrated, digital media are no different from their analog counterparts in fact or as a matter of copyright law. Both the hardware and recording industries foretell that digital media by the end of the decade will be replacing analog technologies, and that the long playing record and analog compact cassette soon will go the way of the Edison cylinder.[1] The only difference in DAB, just as with prior sonic and technological advances, will be incremental improvements in reception and signal quality. But the role that digital sound will play in the lives of consumers will be the same as current analog media they may replace. There is no reason to believe that additional digital technology suddenly, unlike the analog media they soon will replace, on balance will harm rather than benefit copyright interests.

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[1] For example, Tandy Corporation has announced its intention, along with Philips Consumer Electronics Company, to introduce in 1992 a "Digital Compact Cassette" tape player/recorder that Tandy believes "will replace the analog cassette as the standard tape music carrier over the next few years just as the Compact Disk has virtually replaced the LP record album." Presentation at Philips/Tandy DCC Press Conference by Robert M. McClure, President, Tandy Consumer Electronics, January 9, 1991. At least four record companies -- Polygram, BMG, Capitol/EMI and Time/Warner Records Group, have announced their support for the DCC format. Nunziata, "DCC Springs To Life At Winter Show," Billboard (Jan. 26, 1991) at 13.

While most commenters agree with these basic HRRC positions, HRRC responds below to the specific arguments and proposals of the Coalition and RIAA in this proceeding:

1. To paraphrase Mark Twain, the reported demise of the music and recording industries due to home taping is greatly exaggerated. The fact of yet another banner year for record sales and publishing revenues reinforces OTA's conclusions, and points out the flaws of the biased Roper report relied upon, and commissioned by, the music publishers.

2. HRRC takes no position on RIAA's request for performance royalties from commercial broadcast uses of copyrighted works, but agrees that it is proper to consider taxing commercial uses before considering such taxes against noncommercial home taping. However, it would be unfair, as some have suggested, to tax home taping or tape recorders as a proxy for performance rights in sound recordings.

3. RIAA's request for mandatory broadcast of subcode information, apparently to be used to prevent or tax home taping, is not made innocuous simply because the codes are now inaudible. What was mainly wrong with RIAA's CopyCode system was not that it degraded sound quality, but that it interfered with the right to tape for personal use. There is no legal basis for preventing or taxing home taping, so broadcasters should not be forced to include technological means of doing so in DAB broadcast signals.

4. RIAA's proposal to restrict or tax broadcasts of more than a single cut over a limited period of time is the unkindest cut of all. It is unjustified since home taping from broadcasts is legal and never has been shown to hurt the music or recording industries. Restricting broadcast content for commercial gain -- if permissible under the First Amendment -- sets a poor precedent.

5. Any claim that domestic royalty taxes are needed to assure access to foreign royalty pools would sacrifice principles of international law for short-term financial self interest. Any foreign legislation excluding U.S. copyright holders offends international copyright and commercial treaty obligations. It would be better to attack those policies rather than to "pay-off" the music and recording industries. In any event, foreign governments that wish to do so can find other ways to keep blank tape tax revenues for themselves.

I. THE ALLEGATION THAT DAB AND HOME TAPING WILL HARM COPYRIGHT HOLDERS, LIKE THE © COALITION-SPONSORED "ROPER REPORT," IS HIGHLY SUSPECT AND TOTALLY UNREALISTIC.

A. Commenters Agree That Home Taping is Fair and Legal.

HRRC discussed at length in its initial Comments to the Copyright Office the reasons why technological advances in consumer recording equipment always have helped rather than harmed copyright interests. Citing extensively to the objective and comprehensive OTA Report,[2] HRRC described the evidence showing that:

-- technological advances make little difference in home taping habits;

-- home taping from broadcasts traditionally has not been extraordinary, for reasons relating to inconvenience, time and tedium rather than to alleged deficiencies in sound quality;

-- home taping, whether from broadcasts or prerecorded media, tends to stimulate album sales;[3]

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[2] U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, DC: US Government Printing Office, October 1989) (hereinafter "OTA Report"; tables of survey results in Appendix C to the OTA Report are cited as "OTA Survey, Table ___").

[3] N.V. Philips President Jan Timmer highlighted this symbiotic relationship between consumer tape recording and sales of prerecorded software in a recent speech to the International Federation of the Phonographic Industry:

> "[T]he compact cassette's recording feature has had a considerable effect on business growth! Indeed, I will go so far as to say that: The copying feature is an enormous benefit to both sides of the music industry - hardware and software! The copying feature stimulated sales of the cassette recorder; the sale of recorders, in turn, stimulated the sales of prerecorded cassettes.

Address to IFPI Conference, January 23, 1991, submitted as attachment 1; emphasis original.

-- possible sales displacement from home taping, according to OTA, is probably much lower than even its "upper-bound" estimate of only 22 percent; and,

-- on balance, the costs to society of taxing or unduly restricting home taping outweigh any alleged harm to copyright holder interests.

Other comments submitted in this Inquiry show a broad base of support for these factual propositions, as well as for the equally fundamental legal argument that home taping for private, noncommercial purposes is legal. Broadcaster representatives National Association of Broadcasters and CBS, Inc., and petitioners for digital broadcast licenses CD Radio, Inc. and Strother Communications, recognize that home taping from broadcasting never has been, and doubtless will never be, a meaningful substitute for purchases of prerecorded audio software. The National Association of Recording Merchandisers, which has a stake in the continuing health of the record industry, also "does not believe that a major increase in taping off the air would result from the introduction of DAB." NARM Comments at 3.

B. The Copyright Office Shouldn't Advocate Solutions for Nonexistent "Problems."

Several of these commenters also agree with the HRRC position that the Copyright Office seems to be seeking solutions for "problems" that do not presently exist and that at best are speculative, depending upon what DAB ultimately is, and when and

how DAB arrives.[4] Even Broadcast Music Incorporated ("BMI"), which represents the interests of more than 30,000 publishers, 70,000 songwriters and 1.5 million songs, expressed sincere doubts whether DAB might meaningfully change home taping habits:

> Whether the mere fact that the sound quality is superior to analog broadcasts would cause listeners not otherwise predisposed to home-tape to do so is speculative, but the assumption can be fairly made that the universe of potential home tapers would likely grow somewhat, if only by a small amount, because of the increased quality that became available.[5]

And as cited in HRRC's initial Comments, Capitol Records intends to start its own digital cable radio channel, and "is not worried about home taping of the Capitol Channel's broadcasts. [Executive vice president Art Jaeger] says that it should not be any more extensive than current home taping off of radio programs."[6]

Since there is no substantial justification for royalty taxes, technological restrictions or invasive monitoring procedures, there is no reason to suggest or advocate such solutions. HRRC strongly opposes the notion that digital technology should be deployed -- at consumer expense -- to prevent or monitor home taping, or to collect royalty taxes, simply because it is possible to do so.

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[4] Until a DAB system is chosen from the competing proposed methods of transmission, it would be impossible, first, to decide whether or how DAB might affect copyright holder interests and, second, to assess the relative costs, benefits or detriments of conceivable amendments to the Copyright Act. HRRC thus concurs with the NAB's assessment that this Inquiry seems "precipitous and premature." NAB Comments at 2, 4-6.

[5] BMI Comments at 1; emphasis added.

[6] Nunziata, "Capitol Takes to the Airwaves Via Own Digital Cable Radio Channel," Billboard, June 30, 1990, at 93 (emphasis added).

C. The © Coalition-Sponsored Roper Report Is Biased and Unreliable.

A reason given by the Office of Technology Assessment for launching its major new study of home taping was that previous surveys commissioned by stakeholder interests typically had not provided enough methodological detail to allow the reader to judge whether the methods used would be likely to create biases in the findings. Literally on the heels of OTA's thorough, well documented, and impartial study, the tendentious new Roper report sponsored by the © Coalition[7] makes no effort to address these concerns, and provides minimal information about its design and execution.[8]

Yet, even on the basis of the limited information given, the inherent biases of the Roper report are apparent. In contrast to the OTA methodology, focusing on the most recent taping and listening activity as the most reliable statistical measure of consumer behavior, Roper relied on imprecise and unfocused questions such as "From time to time, do you . . .," "Would you . . .," (i.e., "would you ever") or "do you think it is something that you would . . . ." Such open-ended questioning specifically

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[7] The © Coalition Comments only mention that the Roper report was submitted to the Senate Commerce, Science and Transportation Committee's Subcommittee on Communications, as if the report were commissioned by the Subcommittee itself. At least ASCAP in its Comments was forthright enough to admit that the Roper survey was "commissioned by the © Copyright Coalition." ASCAP Comments at 7.

[8] HRRC submitted to the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation a more comprehensive critique of the Roper report. That critique is submitted herewith as attachment 2.

was rejected by OTA as being one of the oldest tricks in the book, and a reason justifying scientific and impartial surveys.

The principal "finding" by Roper, for example, that home taping allegedly would increase with widespread purchasing of consumer DAT recorders, results from piling speculation upon hypothecation upon conjecture: "If you had this digital audio tape recorder, do you think you would make more tapes of pre-recorded music than you do now, make fewer tapes, or make about the same number of tapes as you do now?" In other words:

-- Assuming that the subject knew what a digital audio tape recorder was (only 1/4 of those surveyed had heard or read anything about DAT), or understood the explanation given of what a DAT recorder is (which sounds more like advertising copy than a neutral definition);

-- Assuming further that the subject would be interested in purchasing a DAT recorder (only 40 percent had any degree of interest in doing so, even at a hypothetical $300-500 price);

-- Assuming even further that the subject would be interested in recording anything using a DAT recorder (48 percent of the 40 percent interested in DAT said they would use it only for playback purposes);

-- Then, on the basis of those assumptions, the subject was asked to please speculate whether he or she might tape more or less music than now, if he or she purchased a DAT recorder.

Apparently no effort was made to survey the thousands of owners of DAT recorders -- at that time, primarily songwriters, musicians, music industry executives and audiophiles -- to see how they actually are using their DAT recorders.

Another of Roper's principal projected findings, namely that more than 1 billion "infringing" tapes were made in 1989, and the resulting "purchase displacement" estimates, are presented without

any description of the underlying methodology. Roper at 8. However, the inadequate foundation of the Roper estimate is revealed by its complete inconsistency with data on blank tape sales. The Roper estimate is almost exactly three times the number of blank tapes sold in 1989, despite the fact that a substantial proportion of these blank tapes sold were used for business purposes or for recording non-copyrighted material.[9]

The Roper survey may have been satisfactory to the ° Coalition for its own purposes. But the Roper report is patently an inadequate basis for forming copyright policy. HRRC urges the Copyright Office to rely instead on the impartial findings of OTA.

D. Digital Audio Services Will Promote Rather Than Displace Music Sales.

The ° Coalition says it believes that home taping from DAB will "not only displace sales, they will replace sales of music in CDs and other prerecorded formats." Comments at 16. HRRC has addressed the fallacies underlying such arguments in its initial Comments and need not repeat them here. What the ° Coalition fails to mention, of course, are the marketing opportunities its members already are reaping from DAB.

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[9] Blank tapes sales in 1989 were roughly 360 million units. See OTA Report at 201, and Electronic Industries Association data showing blank tape sales declined by 6.8 percent from 1988 to 1989. Re-use of blank tape cannot explain the discrepancy between the Roper estimate and blank tape sales because the OTA Survey found that 70-80% of home tape recordings are made with new blank tape that has not been used before; Roper similarly claims that more than 8 of 10 tapes made are "libraried" by home tapers. See Roper at [illegible].

For example, the comments of ASCAP and BMI note that they have had no trouble licensing DAB cable services and certainly will be able to collect performance royalties from other DAB broadcasters. DAB also makes possible what RIAA describes as the "celestial jukebox," i.e., a library of digital recordings that can be ordered by consumers from their homes -- producing additional revenues for songwriters and recording companies as well. Other optional DAB services such as "pay-per-listen" concerts can be offered and consumers can subscribe to them, if they so choose.

It seems obvious that consumers will prefer the convenience of such novel DAB services to the inconvenience of sitting by a tape recorder, waiting for the song to come on the radio and hitting the record and stop buttons at just the right times. It seems obvious that, if such services are offered to consumers at reasonable prices, the music industry will further flourish, rather than perish, in the hands of DAB.

II. FEES FOR COMMERCIAL USES OF COPYRIGHTED WORKS SHOULD BE CONSIDERED BEFORE CONSIDERING TAXES OR RESTRICTIONS ON PRIVATE, NONCOMMERCIAL HOME TAPING.

HRRC observed in its initial Comments that the Copyright Office had misplaced the focus of its inquiry, since there was no evidence to suggest that digital technology would have any impact on either the legal status of home taping, or its benefits on balance to copyright holders. RIAA also has attempted to refocus the inquiry by addressing commercial uses of copyrighted works, i.e., a performance right for sound recordings. HRRC takes no position as to whether such commercial uses of copyrighted works

should be taxed. However, several related points should be emphasized.

As a matter of fundamental fairness and sound policy, taxation of commercial uses of copyrighted works should be considered before considering taxation of noncommercial home taping for personal use. In the event that fees for commercial use are considered appropriate, it would warp priorities to, instead, impose taxes on home use recording, as a proxy. Consumers already support the music industry by purchasing albums, music videos, concert tickets and related merchandise, resulting each year in record-setting sales and profits for record companies, musicians and songwriters.

Taxing consumers for broadcast use of sound recordings would be double taxation, since consumers already pay for broadcasting and, therefore, broadcasters' use of recorded music. Commercial broadcasting is supported by consumer purchases of advertised products. Noncommercial broadcasting, likewise, is directly and indirectly "listener-supported." Since consumers would pay the added costs of any performance rights and royalties assessed against broadcasters, possible legislative adoption of performance rights for commercial use of sound recordings would diminish any rationale to impose additional taxes or restrictions on home recording for noncommercial private use.

Home use recording and playback of broadcasts is merely one type of reception, with no more impact on the music industry than repeated broadcasting by a radio station. To directly impose yet

another tax on consumers for broadcasters' commercial use of recorded music is unfair and unjustifiable.

III. RIAA'S REQUESTS FOR MANDATORY SUBCODES AND PROGRAMMING RESTRICTIONS ARE INAPPROPRIATE.

As in its comments to the FCC, RIAA also asks the Copyright Office to support two additional requests, i.e., to mandate the inclusion of subcodes in DAB signals so that the record industry will be ready to technologically assess and collect royalty taxes against broadcasters and home tapers, should Congress ever in the future decide that such royalties are justifiable; and to require broadcasters to pay for a license to broadcast more than one song at a time by a particular artist. HRRC addresses below the issues raised by RIAA in this Inquiry, to the extent they bear on the question of private, noncommercial home recording by consumers.

A. Individual Broadcasters Should Decide Whether to Broadcast Extraneous Subcode Information.

As HRRC noted in its original filing, no additional subcode information is necessary for accurate reception of digital signals or for operation of the Serial Copy Management System for digital audio tape recorders. Thus RIAA's characterization of its subcode proposal as promoting public interests is somewhat of an exaggeration. It seems unlikely that the public has a need to know the Universal Product Code number for every song played on the radio. The subcodes that RIAA seeks to make mandatory appear to

relate solely to commercial interests tied to a home taping royalty tax agenda.[10]

Broadcasters Want Subcode Bandwidth For Other Purposes. Comments submitted by broadcasters to the FCC almost uniformly emphasize the need to limit the number of bits to be transmitted or broadcast per second so as to minimize bandwidth and expense, and to maximize use of the available spectrum. One of the principal criticisms of various proposed DAB systems is the number of bits per second required, noting that even seemingly insignificant increases may reduce the number of DAB stations in each market by three or more.

RIAA naturally would like to reserve these subcode bands for its members. RIAA members presently are free to control subcode information content on prerecorded compact disks and digital audio tapes. But the issue here is what subcode information should be broadcast, which implicates the duty of broadcasting to serve the public interest.

Broadcasters have in mind other plans to serve their audiences, e.g., to maximize the number of available DAB licenses; or to display on-screen information such as station identification, program format description, program listings, weather forecasts,

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[10] RIAA refers to a proposal recently made to the International Electrotechnical Commission, IEC 958, that would reserve 162 bits of subcode data in a compatible consumer interface signal for identification of musical compositions. While RIAA describes this proposal as if it were already a fait accompli, the proposal is in fact only in embryonic stages of consideration and, even if adopted, would be voluntary and not mandatory.

traffic updates, sports scores or stock market reports, whenever the listener wants it and without interrupting the program flow.

Sound engineers also are considering additional ways to use subcode information to enhance listening enjoyment. For example, a growing trend in sound equipment is digital signal processing ("DSP"), used to effectively recreate in the home the sound of the recording studio, club or concert hall where the recording was made. In conjunction with "smart" speakers, DSP soon may be able to automatically adjust speaker sound dispersion to obtain near-optimal sonic reproduction in any room environment. Engineers envision that within a few years DSP commonly may be available in standard audio components, and that standardized codes will be developed to trigger and control DSP operation. When that happens -- very possibly by the time DAB becomes available in the United States -- broadcasters understandably may want to include such DSP-controlling subcodes in their broadcast and cable signals.

HRRC submits that optional subcodes should not be reserved as a beachhead for later collection of royalty taxes. In the absence of legislative action mandating any such taxes, each broadcaster should instead remain free to exercise its own judgment as to how it may best serve its listeners, whether it be through subcode data related to music, sound quality, news, business, sports or any entertainment form. Such a market-oriented approach would better serve the interests of both the broadcasters and the consuming public and, ultimately, the music and recording industries as well.

Broadcasters Can Voluntarily Agree To Include Music-Related Subcode Information. Although in its infancy, the digital audio cable industry already has no shortage of takers for music-related information. At least one digital broadcaster, International Cablecasting, has announced a service benefitting both its customers and the recording industry -- a remote control unit that displays details about what is being played, and gives a toll-free telephone number to call and order the compact disc.[11] SkyPix, an 80-channel digital television broadcast service, intends to offer its viewers of concerts and music video collections the ability to order the artists' CDs and tapes on the spot via remote control. Capitol Records created its own digital audio service to promote its artists on the Digital Planet system.[12] To the extent future services may require new regulatory authority, HRRC, RIAA and others will be free to comment. But it makes little sense to foist unnecessary subcode data upon broadcasters when those who desire to offer the RIAA's proposed services clearly have the means to do so.[13]

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[11] Lublin, "Cable TV To See If Cable Radio Means Sweet Music For Revenue," Wall Street Journal, B-10 (November 6, 1990). See also Stark, "Cable Audio Services Dialing For Dollars," Billboard (Jan. 26, 1991) at 19.

[12] Nunziata, "Capitol Takes to the Airwaves Via Own Digital Cable Radio Channel," Billboard at 93 (June 30, 1990).

[13] RIAA's position, moreover, does not represent the only path to its purported goal. In one breath RIAA decries the threat of digital radio displacing record sales. But in the other, it asks to mandate the broadcast of information, such as track identification, playing time, song lyrics and liner notes, currently exclusively provided by the industry as an inducement to purchase. If record companies truly wanted to preserve their

The Copyright Office Should Not Support Broadcast of Subcode Information Simply To Support RIAA's Wishful Thinking About Royalties. RIAA's contention that there should be mandatory subcodes to implement a technical system of collecting royalty taxes so that if, perchance, Congress one day enacts a right to collect such taxes, puts the cart before the horse. As HRRC noted in its initial Comments, Congress and the Supreme Court have consistently upheld home taping for private, noncommercial purposes as a legitimate activity that should neither be prohibited nor taxed under the copyright laws.[14] The decision as to whether the 20 year-old legal status of home taping should now be changed rests

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asks to mandate the broadcast of information, such as track identification, playing time, song lyrics and liner notes, currently exclusively provided by the industry as an inducement to purchase. If record companies truly wanted to preserve their ability to market their products, one wonders why RIAA should not wish to prohibit the broadcast of optional subcode information that otherwise would be available only by purchasing prerecorded works.

[14] To rebut the HRRC's well-supported legal arguments, RIAA cites a 1982 law review article by Melville Nimmer, based on a memorandum commissioned by the RIAA and the National Music Publishers Association, and a 1983 speech given by former Register of Copyrights David Ladd. With due deference, the late Professor Nimmer's conclusion that home taping is not a "productive" fair use was eviscerated by Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984). Moreover, the former Register's opposition to basing rights upon "harm" also does not apply. As the Sony Court found, copyright law does embody a balance between the free dispersion of expression and financial incentives to creators. The fourth factor of the fair use analysis, which even Professor Nimmer concedes applies to home taping, requires examination of the effect of fair use copying on the potential market for the works -- and, therefore, an analysis of "harm." A more recent law review article may instead merit Copyright Office review -- indeed, it won an ASCAP-sponsored award for excellence -- which concludes that home audio taping on DAT recorders constitutes fair use under copyright law. Plumleigh, "Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire," 37 UCLA L. Rev. 733 (1990).

with Congress. It is inconceivable that such basic decisions could be changed through mandatory technological subcode implementation rather than through Constitutionally-mandated legislative decisions and policies.

Moreover, Congress has not had any chance to determine whether the particular technical assessment and collection system advocated by RIAA is fair, nondiscriminatory and nonintrusive, or even feasible. Indeed, RIAA has failed to define just what information it would mandate or how its system of royalty tax assessment and collection would work.[15] The Copyright Office should reject RIAA's attempt to administratively and technologically implement a system of taxation without any legal or even technical basis.[16]

B. The "Single Cut/Limited Period" Rule Proposed by RIAA Is An Unnecessary, Perhaps Unconstitutional, Form of Censorship.

RIAA says that to avoid "devastating" the recording industry, the Copyright Office should advocate an administrative or

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[15] Presumably, RIAA intends to implement some sort of "debit card" system. HRRC previously has expressed its opposition to any debit card system in its initial Comments to the Copyright Office and its July 16, 1990 submission to the Senate Subcommittee on Communications, Committee on Commerce, Science and Transportation. Tandy Corporation Chairman John Roach also recently criticized the debit card proposal, and all royalty tax proposals, in his column, "The Chairman's Thoughts," sent to customers of Radio Shack stores. A copy is submitted herewith as attachment 3.

[16] Indeed, it may be doubtful that RIAA actually wants this debit card-related subcode information. In an apparent disagreement among copyright stakeholders, RIAA seems to want a debit card, but other copyright interests seemingly have determined they can get more money by a tax on all blank tape, whether used for recording prerecorded music or not. There certainly seems to be no reason to use up limited subcode data space where the parties cannot even decide whether such data would ever be used for its purported purposes.

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legislative prohibition against digital audio radio broadcasters playing more than a single song from an album or artist during a limited period of time. The reason alleged for such a measure is RIAA's contention that playing of multiple cuts by a single artist "induces" home taping. HRRC has no problem with RIAA discussing broadcast practices with broadcasters. But as a purely administrative or legislative precedent, a single cut rule would be the unkindest cut of all.

Current Practices Suggest No Need For Prior Regulation of DAB. There is no legal justification for a "single-cut" rule, since home taping for private, non-commercial use is a legitimate consumer activity. In practice, no "single-cut" prior restraint has ever attached to FM stereo broadcasts, nor has such a restriction ever seemed necessary. The independent OTA study found that only 27 percent of those surveyed taped music from radio or television broadcasts at all during the prior year. OTA Report at 152-153. A larger percentage of those surveyed, 32 percent, had made voice recordings (i.e., other than from broadcasts or prerecorded media) in the prior year. See OTA Survey at 277, Table 9-1. Significantly, more than half of those surveyed, 54 percent, said they never had recorded music from radio or television broadcasts. OTA Survey at 262, Table 5-5. With respect to the particular prior restraint advocated by RIAA, the OTA survey suggests that only a scant eight percent (8%) of tapes made from broadcasts involved

taping of entire albums. OTA Study at 155.[17] While RIAA may have a "one-track" mind about achieving new royalty taxes, its "single-cut" rule cannot be justified by home taping from broadcasts.

To the extent that DAB competes against or replaces traditional radio stations, there is no reason to believe that programming practices will significantly differ from current programming in which the playing of entire pop album sides already is the rare exception. The reasons why are obvious. If radio, digital or analog, is to compete against listening to prerecorded disks or tapes, especially in cars and offices where most radio listening occurs, then stations must offer substantially more program content than just playing albums.

While this rationale may seem less applicable for DAB cable services, RIAA's proposed regulation appears unnecessary in that arena as well. International Cablecasting already has announced its intention to mollify RIAA complaints by not preannouncing records and by not playing full albums on its Digital Music Express

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[17] Data about listening habits further confirms that homemade tapes of broadcasts do not displace record sales. Only about 12% of the recordings to which respondents last listened were home recorded tapes. OTA Survey at 150. Of these, less than three-and-one-half (3-1/2) percent were tapes made from radio broadcasts. OTA Survey, Table 3-14. If consumers really considered home tapes as fungible with prerecorded albums, consumers would be just as content to listen to them, and would spend much more time listening to tapes made from broadcasts than OTA found that they did. OTA Report at 156. See also HRRC Comments at 30-32. Moreover, if home taping of broadcasts truly displaced record sales, the industry's latest cash cow -- the cassette single -- would never have been viable or, for that matter, would not have so quickly replaced the 45 rpm vinyl single.

channels.[18] Similarly, RIAA's fear of "hours of uninterrupted music" from digital radio does not jibe with commercial reality. The Digital Planet cable audio service believes that announcerless services just don't work, and that people stop listening as the novelty quickly fades.[19]

The Single Cut Rule Hampers Broadcaster Creativity and Audience Enjoyment. Making virtue a necessity tends to make necessity a virtue. As Eastern Europe has learned, over-regulation suffocates the good with the bad. Any regulation that prevents, taxes or inhibits a broadcaster's ability to freely program this new digital broadcast medium would saddle DAB with the same flaws and complaints about present radio -- that stations too often approach music in a shallow and a repetitive manner, becoming a promotional jukebox for the "latest hit single" instead of a means of communicating music, information and art.[20] The "single cut" rule will cut to the quick any hope of using DAB to make

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[18] Stark, "Cable Audio Services Dialing For Dollars," Billboard (Jan. 26, 1991) at 23.

[19] Id. at 19.

[20] What is perhaps most ironic about RIAA's argument is that radio always has been the industry's primary marketing tool for selling prerecorded music. Record companies give stations free promotional copies of albums, and other inducements, hoping to receive enough airplay to make or break a record. Consumers hearing an entire album or several songs from a particular artist may decide they like enough of the songs to buy the artist's records. They might not reach that conclusion, under RIAA's proposal, by hearing only one song, or the same "hit single" over and over again.

alternative formats commercially viable, and run contrary to the public interest.[21]

Requiring additional license fees for broadcast of complete works would in effect be a tax on serious music stations. Unless broadcasters paid this additional license fee, opera lovers would hear the Overture one day, Act One Scene One the next, and so on; symphonies would be broadcast one movement at a time; jazz suites by Duke Ellington or Charles Mingus could not be heard in their intended form.[22] Extra fees would be required for a station to honor the passing of musical giants, such as Leonard Bernstein or Aaron Copland, with broadcasts of a body of works, or to commemorate Beethoven's birthday with a broadcast of all nine symphonies. Rock stations could not play continuous works, such as the Beatles' "Sergeant Pepper's Lonely Hearts Club Band," the Who's

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[21] In fact, audio cable services already are planning to serve diverse national market sectors that would not be generally capable of attracting a sufficient audience in limited geographic markets. An analog cable service, Superadio, with 5 million subscribers nationwide, currently offers six different music formats, a children's format, a business news channel and a format for the visually impaired. International Cablecasting Technologies intends to offer digital audio channels for opera, chamber music, reggae, blues and Broadway showtunes. Stark, "Cable Audio Services Dialing For Dollars," Billboard (Jan. 26, 1991) at 19. See also Fantel, "Dishes Serve Up a Rich Feast of Radio," The New York Times, (December 9, 1990) at H-18.

[22] These examples demonstrate the serious flaws with RIAA's proposal. If the purpose of the "single cut" rule is to prevent or tax alleged "inducements" to taping of entire albums, then it would logically apply to virtually all classical music, which commonly comprises entire disks or even multiple disks. If RIAA's proposal would permit broadcasts of entire symphonic or operatic works without acquiring such licenses, then its proposal singles out disks that contain several works, primarily jazz and popular recordings. In this case, the "single cut" rule is not content-neutral and may further offend the First Amendment.

rock opera "Tommy" or Pink Floyd's "The Wall," without again paying the piper. Broadcasters should not have to choose between excess economic burdens and public edification.

The Proposed Restraint May Be Unconstitutional. Even assuming that the RIAA-proposed restraint would be content-neutral (but see p. 21 n.22, supra), it still appears to be unconstitutional. Content-neutral restrictions upon free expression violate the First Amendment if they do not further an important or substantial governmental interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). RIAA's one-cut rule does not promote any important or substantial governmental interest, and there is no evidence to demonstrate that RIAA's concerns are anything more than speculation and innuendo. Cf. Home Box Office v. FCC, 567 F.2d 9, 50 (D.C. Cir. 1977). The only impartial governmental evidence concerning home taping, from the OTA report, demonstrates decidedly that the rule is not needed. Moreover, the broadcast of entire works is legal, as is home taping of those works, and should not be subject to double-taxation.

IV. FOREIGN EXCLUSION OF U.S. COPYRIGHT HOLDERS FROM ROYALTY TAX POOLS WOULD NOT BE CURED BY TAXING HOME TAPING.

Both RIAA and the ° Coalition contend that unless U.S. law is changed to assess royalty taxes on home tapers, U.S. copyright interests will continue to be carved out of foreign royalty tax pools. The argument, however, is disingenuous as a matter of law, and disreputable as a matter of policy.

Foreign "reciprocity" legislation, i.e., laws that would deny royalties to U.S. copyright holders unless the U.S. enacted legislation granting royalties also to foreign copyright holders, violates multilateral treaty obligations. These treaty and convention obligations require that any legislation granting royalty rights to domestic copyright holders must also benefit foreign copyright holders in countries acceding to these treaties. Adoption of royalty taxes here does not mitigate the violation of international obligations; and foreign countries nonetheless may find other ways to avoid having to reciprocate.

A. Foreign Reciprocity Laws Violate National Treatment Obligations under the Berne Convention.

Article 5(1) of the Berne Convention provides that authors of copyrighted works protected under the Convention "shall enjoy ... the rights which their respective laws [of signatory countries] do now or may hereafter grant to their nationals." Thus, countries that recognize composers and producers of sound recordings under the Berne Convention must grant national treatment also to U.S. copyright holders. Countries that withhold copyright royalties from U.S. copyright holders would unlawfully deny national treatment in violation of the Berne Convention.

Home taping royalty tax legislation is not required by the Berne Convention.[23] All but 13 Berne countries do not tax home

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[23] Indeed, some in the international community argue that royalty taxes are prohibited by the Berne Convention. Viewing Article 9(2) of Berne as taking an "all or nothing" approach, they reason that if a country finds that home taping does unreasonably prejudice the legitimate interests of authors, then that country must outlaw home taping. But if unreasonable prejudice exists,

taping. The U.S. Congress also made this point clear when acceding to the Berne Convention, effective March 1, 1989. At that time, certain amendments to U.S. copyright law were enacted so as to conform the U.S. Copyright Act to the Berne Convention. None of those changes affected in any way the rights pertaining to home taping from sound recordings or broadcasts. No suggestion was made even to propose royalty tax legislation at that time.

Indeed, Berne Convention Article 9(2) permits a country to exempt private home use recording from the rights of copyright holders: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Each country may determine whether the "legitimate" interests of authors are "unreasonably prejudiced" by home taping. If not, then it is perfectly consistent with the Berne Convention to permit home taping for personal use, and not to require payment of royalty taxes. The OTA findings demonstrate on balance that such "prejudice" does not exist and, therefore, that home taping should neither be restricted nor taxed because of obligations under the Berne Convention.

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they contend, Berne does not allow governments to sanction home taping via compulsory licenses for private copying in return for a royalty tax levy.

B. Foreign Reciprocity Laws Violate National Treatment Obligations under the Rome Convention.

Those countries that protect sound recordings under the Rome Convention also must grant national treatment to foreign "neighboring rights" holders. Article 2(1) of the Rome Convention defines "national treatment" as treatment accorded by the domestic law of the country in which protection is claimed. Articles 4, 5 and 6 require signatory countries to grant national treatment to performers, producers of sound recordings and broadcasting organizations resident in other signatory countries.

Like the Berne Convention, the Rome Convention permits each country to legislatively exempt home taping for private purposes. Article 15(1) provides, "Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: (a) private use."

Synthesizing the provisions of these two conventions, each country has the right to exempt home taping for private purposes from the scope of copyrights or neighboring rights. But if any country requires compensation for home taping for copyright or neighboring rights holders, then that country is required to grant national treatment and to pay those royalties also to rights holders from foreign signatory countries. Any legislation, such as the controversial Australian law cited by the ° Coalition, that would condition payment of such royalties to foreign copyright holders upon reciprocal legislation in foreign countries would in fact violate the principles of national treatment.

C. Foreign Countries Would Continue To Resist Paying "Commercial" Royalty Taxes to U.S. Copyright Holders.

Some countries have tried to justify their lack of national treatment by claiming that their royalty levies are enacted by "commerce" legislation rather than by copyright law. Thus, they contend, there would be no obligation to provide national treatment to U.S. copyright holders under a commerce measure.[24] An example of this type of reciprocity law was enacted by Finland, one of the countries cited by the • Coalition.

If so, then enactment of a royalty tax in the United States would not cure this purported "reciprocity" problem. Countries still could claim that it is permissible to keep their own commercial taxes, which they have determined should be distributed to domestic copyright holders, rather than distribute them as "royalties" to U.S. copyright holders. In any event, countries determined to exclude U.S. copyright holders from royalty tax pools likely will find a way to amend or repeal their laws to nonetheless keep these royalty-related tax revenues on their own shores.

D. The U.S. Should Not Hold Itself Hostage To Foreign Violations.

It therefore is incorrect, and cynically countenances foreign treaty violations, for U.S. copyright interests to argue that the

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[24] Even this ingenious argument, however, is doubtful. The General Agreement on Tariffs and Trade, and numerous Treaties of Friendship, Commerce and Navigation between the United States and foreign countries, also require "national treatment" and/or "most favored nation" status for signatories with regard to commercial laws. Discriminatory treatment embodied in commercial "reciprocity" laws also may be deemed obnoxious to these treaty obligations.

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United States must enact royalty tax legislation in order to obtain royalty taxes levied in foreign countries. Any endorsement of such a position by the U.S. Government would represent an assault on the domestic rights of U.S. consumers in preference to a vindication of the international rights of U.S. copyright holders and performers. Were it not for the self-interest of these copyright holders in seeking domestic royalty taxes, the music industry would be fighting foreign discrimination against U.S. artists, rather than encouraging it!

V. CONCLUSION

New technologies always are initially met with fear and table-banging from various copyright interests. In the end, these technologies always are embraced as profit centers that fuel new growth for the ever-expanding entertainment industries.[25]

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[25] In another recent column sent to Radio Shack customers across the United States, Tandy Corp. Chairman John Roach wrote:

> There are many legitimate uses for recorders, including taping messages to send to friends and relatives, recording music to listen to at home or on-the-go, and taking audio 'notes' of lectures and meetings for study or review. Unfortunately, some music publishers and recording artists believe they are being 'ripped off' by consumers who make recordings. As a result, music industry representatives have petitioned Congress and the courts to stop electronics innovators from introducing state-of-the-art sound recording systems. In their opinion, 'you' don't have the right to this technology. It's difficult for me to understand why there is an objection to new technologies when existing ones have made possible the growth of a huge music industry.

A copy of this column is submitted as attachment 4.

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DAB, once again, unfortunately pits the commercial interests of copyright holders against the interests of consumers in the availability of improved technologies. HRRC submits that it is high time to put aside the initial rhetorical volleys over the "dangers" of new technology, and to stop withholding from consumers digital tape and broadcast technology which, as all technologies before them, will profit copyright interests, hardware manufacturers and consumers alike.

For more than twenty years, the status quo in the analog domain has been that home taping should neither be prevented nor taxed. Without compelling evidence of any need for royalty taxes, technological restrictions or any other such sweeping changes, the status quo of home taping for private, noncommercial use should be preserved in DAB and throughout the digital domain.

Respectfully submitted,

Gary J. Shapiro

Gary J. Shapiro
Chairman
Home Recording Rights Coalition
c/o Electronic Industries Association
Consumer Electronics Group
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202-457-4919

January 31, 1991

Attachment 1

Windows of Opportunity for the Music Industry

Address by Mr **J.D. Timmer**, President & Chairman
of the Board, N.V. Philips' Gloeilampenfabrieken,
to the International Federation of the Phonographic Industry IFPI Conference,
Cannes, January 23, 1991

PHILIPS

Just over a hundred years ago, Thomas Alva Edison invented the phonograph. The great inventor's recording of a single phrase from a popular English nursery rhyme marked the very beginning of the recorded music industry. The words: "Mary had a little lamb..." were the first ever reproduction of the human voice.

Though most of you here will be familiar with the history of the music industry, I would like to highlight a couple of historic facts which I believe have a direct bearing on this conference.

For example, not only was Edison the first manufacturer of sound recording and playback hardware, but he also produced the software. In other words, right from the earliest days, production of hardware and software was fully integrated...and remained so for quite some time.

In Paris, the brothers Charles and Emile Pathé produced the music cylinder rolls as well as the equipment on which to play them. With considerable success too, for by the turn of the century they had a catalogue of no less than 12,000 titles. And even Emil Berliner, inventor of the flat disk gramophone record, started out by producing both gramophones and records.

It was not until the late 1920's that production of music software and hardware started to go their separate ways. As radio broadcasting reached out to a mass global audience, large independent record companies were formed to concentrate on the production of music and music carriers. The production of music playback equipment, including radio sets, was taken up by the rapidly developing consumer electronics industry.

After the Second World War, technological development widened the great divide between music hardware and software even further. Electronic sound amplification brought about the long-playing record, while recording on magnetic tape brought the compact cassette. More recently, digital techniques led to the advent of the Compact Disc.

The rapid pace of technological development meant increasing market demand for new sound systems and music carriers. However,

the rapid technological developments also gave rise to two important questions:

DAT, and all that!

"Will the benefits that are serving an over-dynamic hardware industry so well, be equally beneficial for the software industry?" While the second question was: **"How can the copyright on prerecorded music be protected when the hardware industry is providing the consumer with the recording technology which enables him to make his own copies of original software?"**

The overwhelming success of the Compact Disc during the past decade provides the answer to the first question, for its brilliant career exemplifies how co-operation between the music hardware and software industries can be equally beneficial for both parties. Most importantly, the consumer too is a major beneficiary.

Which brings me to the answer to the second question, which relates in particular to the recording feature of the compact-cassette system. Did you, as representatives of the music industry, ever consider the enormous advantage you gained from the invention of the compact cassette by Philips in the late sixties? Besides the sales of 1.6 billion blank cassettes in one year in the Western world, *sales of pre-recorded music cassettes exceed one billion!*

The "Spirit of Athens."

So apparently, the compact cassette's recording feature has had a considerable effect on business growth! Indeed, I will go so far as to say that: **The copying feature is an enormous benefit to both sides of the music industry - hardware and software!**

The copying feature stimulated sales of the cassette recorder; the sale of recorders, in turn, stimulated the sales of pre-recorded cassettes. In this way, a cycle of music hardware and software was developed, each stimulating the other's sales.

Furthermore, only about 25% of the compact cassette hardware sold around the world is equipped with the recording feature.
The remaining 75% consists of playback-only products such as personal audio and in-car stereo.
And just why is there such a large demand for these non-recording types of product?

It is simply because the consumer can choose from: **A vast library of music software available.**

The controversy surrounding the DAT recorder emphasizes the interdependency of the music hardware and software industries - but in a negative sense. Because it shows where weakness in co-operation can lead to. You were skeptical about the stimulating effect DAT's copying feature would have on sales of both hardware and software, while hardware manufacturers would not concede the fact that market success of their DAT products would depend largely on the availability of pre-recorded music software.

So what eventually became known as the "DAT Affair," marked the lowest point in a worsening relationship between the hardware and software industries.

Fortunately, the 1989 Athens Conference rescued the situation with the "Memorandum of Understanding." Signed by Messrs Summer and Thomas of the IFPI and Mr. Berman of the RIAA, representing the music industry, and by Mr. Hata and myself, representing the Japanese and European hardware industries respectively, the Memorandum covered a number of agreements on legislative procedures concerning digital recording in general and the prevention of unlimited copying of prerecorded music in particular.

In short, the "Memorandum of Understanding" confirmed the realization that the music hardware and software industries exist in symbiosis - which, according to my dictionary, means:
"The intimate living together of two dissimilar organisms in a **mutually beneficial** relationship."
This definition also underlines my personal satisfaction of the role I was privileged to play in stimulating what I have come to think of as "The Spirit of Athens."

The "Spirit of Athens" succeeded in clearing the air of confusion about the music hard- and software industries - which is good news. The bad news, however, is that the implementation of the agreements that were made in Athens leaves much to be desired. So let's take a look at what's been happening in the world of recorded music since Athens.

In May last year, the Japanese Ministry of International Trade and Industry, MITI, established guidelines requiring every DAT recorder produced in Japan to be equipped with the Solo Copy Management System, or SCMS, that was agreed to at the Athens Conference. The basis of SCMS is a special chip that allows the DAT user to copy from a Compact Disc, while ensuring that the resulting digital taped copy cannot be used for any additional copying.

Thus, our Japanese colleagues have kept their part of the bargain. The same applies to Europe - although our decision-making and legal processes are somewhat slower. And just a few weeks ago, the European Commission made it quite clear that hardware producers should be legally required to include the Solo Copy Management System in their DAT recorders.

It's a very different story in the United States. There, music publishers and songwriters have joined forces in a lawsuit aimed at building a wall around the U.S. in order to keep the DAT recorder from entering the market. Thus any hope that the U.S. would follow Europe's and Japan's lead towards SCMS legalization has completely evaporated.

But just why should America oppose SCMS legalization?
No doubt, many of you here are far better qualified than I to answer this question. But for what it's worth, I believe that the underlying reason is because the proposed SCMS hardware solution is not linked to a legal arrangement governing software royalties. When the DAT Recorder "threatened" the American market, resorting to legal action was seen as the only way to force a settlement of the royalties question.

Personally, I question the wisdom of opposing SCMS by legal means for two reasons: The first is that, as I said earlier, the copying feature of recorders has stimulated the sales of both music hardware and software. When I was responsible for music software at Polygram, I initially became deeply concerned about a possible increase in home recording once digital techniques were introduced - making it possible to obtain perfect tape copies without any loss in quality.

But Solo Copy Management technology allayed these worries, because it *effectively prevents digital tape copies from being made*

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endlessly, thus creating a difference between analogue and digital copying. Thus, SCMS legislation would mean that the existing thorny problem of home copying - instead of being worsened by the introduction of digital techniques - would, in fact, be brought under control. Resisting such hardware legislation - prompted by the desire for a legal settlement for software royalties - could mean only that the software industry is prepared to ignore the fantastic commercial prospects that digital techniques offer.

My second reason for doubting the wisdom of opposing SCMS legislation is the existence of "Critical Time Windows" for new products. To delay the introduction of a promising new product by waiting for a royalty settlement on blank cassettes, *when there is obviously a "Time Window" in place,* is, to put it mildly, not very wise. I will return to the subject of "Critical Time Windows" - and products that match these windows - in a little while.

Another frequently-posed question is whether, in this Compact Disc era, there is still a place for magnetic tape as a recording medium - particularly when we and others are devoting considerable research to develop improved versions of the Compact Disc Digital Audio system. The CD-R, a once-only recordable disc, is one such development, while the CD-E, which allows multiple erasing and recording, is another.

My answer to this question is that I am a ardent supporter of the "Twin-Carrier Concept" - an idea I first introduced in 1986 in Los Angeles. And I repeat here today that I firmly believe in *equal rights for the compact cassette and the Compact Disc.* Both have a place in the consumer market.

The CD, like its predecessor the long-playing record, is a music carrier for the home. It has an image of respectability, the "silver" disc appealing to one's "Pride of Ownership." While the compact cassette is the consumer's "mobile medium." In the consumer's perception the compact cassette is a commodity item, allowing for mobility and recordability.

Like the CD, the compact cassette has been an outstanding success. And both deserve equal billing on the world stage of entertainment.

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Nonetheless, I'm in full agreement with those who say that the days - or perhaps I could better say, the years - of the conventional analogue compact cassette are numbered. And to qualify this I will return to the subject of "Critical Time Window."

Windows of Opportunity

Over the years, the users of music software have developed a "Pride of Ownership" in their collection of records representing a personal, or even emotional, value far exceeding the capital originally invested in those records. From this we can conclude that, so far as music software is concerned, the lifetime is very much longer than that of hardware: a music library doesn't fit within a throw-away culture. Therefore, technological advances that could result in a new form of music carrier must respect the longer life cycle for music software.

The "ripeness" - or maturity - of the market is another important parameter. The preceding generation of music carriers must pass the saturation point in the market before the new generation arrives. In other words, a new music carrier should only be introduced in the right "Critical Time Window." The introduction of the Compact Disc exemplifies what I mean.

In 1979, the long-playing record passed its saturation point when sales peaked at 1.1 billion, for when the Compact Disc was announced two years later in 1981, LP record sales had dropped to 900,000. Thus we can conclude that developments in the hardware industry can only benefit the software industry when the pace of change is in step with "Time Windows" - or perhaps I could better say **"Windows of Opportunity."**

From the sales statistics of LPs, CDs and compact cassettes, we are able to forecast the "time of arrival" of a new "Window of Opportunity" - when the market will be ripe for the introduction of a new music carrier. For example, in 1988, 1989 and probably also in 1990, sales of the pre-recorded compact cassette will average about one billion per year. And as we do not anticipate any further increase in this number, we can only assume that the pre-recorded music cassette has finally passed its market saturation point.

The market for consumer hardware is characterized by a product life cycle of between one and three years. So obviously, the introduction

of any new hardware technology that could lead to a new music carrier must also allow for the longer product life cycle of music software. All of which means that technological breakthroughs in hardware must follow a "Technological Timetable" in order for the software industry to benefit also.

In this context, it could be argued that the introduction of the DAT Recorder onto the market in the mid-eighties was far too early: the Compact Disc had been introduced only a short time before, and the analogue compact cassette had not yet reached the end of its product life cycle.

Today, the situation is completely different. The Compact Disc has developed into one of the industry's most successful products, and the compact cassette has passed its market saturation point. Consequently, we can conclude that, at the present, the market is just as *ripe for the digitalization of the compact cassette,* as it was for the digitalization of the long-playing record ten years ago.
In other words: **The market is asking for a digital compact cassette that can serve as a mass consumer medium!**

I can imagine the question that now springs to the mind of many of you here: "Why not the DAT cassette?" The answer lies in the fact that, on average, every household in the Western world possesses three compact cassette players or recorders, and between 50 and 60 compact cassettes - half of them prerecorded music cassettes. So it's fair to say that the "good old" analogue compact cassette is an extremely popular entertainment medium.

This is why, although we are convinced that the market is ripe for a digital version of the compact cassette, we are equally convinced that the market is not yet ready to discard the millions of analogue cassette players and billions of analogue compact cassettes that have been sold over the past twenty years or so. Conclusion?: **Backwards Compatibility is an essential prerequisite for a new digital recording medium.**

In 1989, Philips developed a revolutionary coding technique that made it possible to write digital music signals on *standard magnetic tape* in a compact cassette housing. This led to the development of a

digital compact cassette recorder with a tape transport system which could also be used for analogue compact cassettes. The design concept of a **backwards-compatible digital cassette recorder** was born.

The lesson of the DAT recorder had been well and truly learned. Why was the Compact Disc player such a market success from the moment it was introduced, whereas the DAT Recorder didn't really take off? The answer is simple: from the start the software industry made a broad selection of CD titles available, whereas prerecorded DAT-cassettes were virtually non-existent. This is precisely why we discussed our breakthrough with the music industry first. Only after sufficient interest in a digital compact cassette was aroused did we go further with our development.

It is the Digital Compact Cassette system's Backwards Compatibility that convinces me of its potential to become a new world standard. The support of so many software companies is particularly satisfying, because cooperation will be the key to achieving the same degree of market success as we achieved together - music hardware and software industries - with the Compact Disc.

With the right cooperation a sufficiently extensive library of prerecorded digital compact cassettes will be available at the time that the new hardware is introduced.
Thus, it is important for you to know that low cost is one of the digital compact cassette's most important features, because, like the analogue cassette, copying from the mother material is done at 64 times the normal playback speed. Such a high speed is not possible when producing prerecorded DAT cassettes.

Another advantage of Backwards Compatibility is that, when the consumer is ready to replace his analogue cassette recorder, the chances are high that he will opt for the new digital hardware. For only a slightly higher cost price he gets Compact Disc quality as well as the ability to play his beloved collection of analogue music cassettes.

And, of particular interest to you all, once the consumer owns a digital compact cassette recorder, sales of prerecorded digital compact cassettes are guaranteed!

I think I have made it clear that, at this point in time, a perfect "Window of Opportunity" exists for the introduction of a digital version of the compact cassette that is compatible with its analogue predecessor. Only the question of legislation governing royalties remains. But is this question really worth the risk of missing a wonderful once-in-a-decade opportunity, an opportunity for a music hard- and software industry cooperating in the Spirit of Athens? We simply don't have the time to waste on the agonizingly slow process of law. **We need to strike now, while the iron is hot!**

It may also be reassuring for you to know that the Solo Copy Management System has been included in the standard for the Digital Compact Cassette system. If, together with SCMS legislation, a system of royalties on blank cassettes is also introduced, as is already the case in a number of European countries, Philips will not oppose this.

Some people in the music world maintain that the copying problem would be solved if Philips supported the idea of royalties. Those who argue this, overrate our political influence, for it is the government authorities, not Philips, that needs to be convinced. And, in doing so, you must also provide the counter-arguments for the various consumer organizations, because that is something that Philips cannot do. We shall, however, do everything in our power to put the Athens Agreements into effect. Together with you we shall seek solutions to problems, where possible.

Before concluding my talk I would like to return briefly to the subject of CD-R and CD-E. Naturally, we do not rule out the possibility that these music carriers will eventually appear on the market. Technological progress cannot and must not be halted, but of course, the "Window of Opportunity" must be taken into account. And in order to maintain the "Spirit of Athens", it will be necessary to reach mutual agreement on these new media. We need to discuss copyright protection by technical means as well as technical standards to guarantee compatibility. It can't be emphasized enough that compatibility is necessary to retain the confidence of the consumer.

The new media must fit into the CD standard or a standard that is a logical extension of this. The times have long passed when a

hardware manufacturer could make the consumer dependent on him by introducing a proprietary system without consulting all parties concerned.

And I would like to particularly stress that it is my opinion that, although I firmly believe that both the CD-R and CD-E are useful and necessary developments, their "Windows of Opportunity" are not yet in place. The consumer - and I do not necessarily include the "HiFi freak" - is still charmed by the wonderful sound of his CD player. To confront him now with other versions of the CD would only lead to confusion. Moreover, by no means all consumers are interested in the recording feature.

Ladies and Gentlemen, hopefully I have made my point about the long-term vision needed to enable the music hardware and software industries to benefit jointly from technological innovations. I have outlined how the copying feature of recorders has triggered a cycle of sales of hardware, on the one hand, and blank and prerecorded music carriers, on the other hand.

I hope that I have also made it clear that the rapid technological developments in the hardware world are also beneficial for the software world, if a carefully considered *Technological Timetable* is taken into account. Such a timetable respects Windows of Opportunity in which new music carriers can be profitably introduced.

I have also shown that a Critical Time Window is now clearly observable for a digital compact cassette that is backwards-compatible. I have high expectations regarding this new medium and I am convinced that it will have just as big an impact on the market as the Compact Disc did a decade ago.

The favorable prospects of the digital compact cassette will be spoilt if we hesitate to introduce it, or if we introduce prematurely other new music carriers for which a Window of Opportunity is not in sight.

The Window of Opportunity for the Compact Disc was the early '80s. For the digital compact cassette it will be the early '90s. For CD-R and CD-E I envisage the Window of Opportunity occurring from the

mid-90's. I trust that this vision will be confirmed the same as at the 1983 IMIC Conference in Portugal, when I predicted the demise of the longplay record by the beginning of the '90s!

So I shall conclude by saying that it is in everybody's interest to introduce a new music carrier when its Window of Opportunity has arrived. That means in the interests of a cooperating hardware and software industry still inspired by the "Spirit of Athens".
A stimulating spirit, such as that which inspired Edison when he recorded his own voice on his primitive phonograph.

The great inventor's piece of homespun experimentation ultimately grew into a worldwide industry that provides:

employment and prosperity for **hundreds of thousands**
and
intense musical pleasure for **hundreds of millions.**

Thank you!

Attachment 2

THE ROPER SURVEY REPORT OF CONSUMER HOME TAPING AND PROJECTED DAT USE: HIGHLY SUSPECT AND TOTALLY UNREALISTIC

In the spring of 1990, the Copyright Coalition hired the Roper Organization to conduct a consumer survey to estimate the extent of home taping of prerecorded music and to project the level of such taping that might occur with the advent of DAT recorders in the United States. The Roper Organization presented its findings in a fifteen-page report. An analysis of the report shows that, as presented, it lacks credibility.

The Roper survey purportedly was intended to gather information about the extent of home audio taping of prerecorded music, and to project the level of such taping that might occur with the advent of digital audio tape equipment in the U.S. consumer marketplace. Apparently, no efforts were made to contact the owners of the thousands of DAT recorders already in use in the United States.

A. THE ROPER SURVEY IS NOT DESCRIBED IN SUFFICIENT DETAIL TO JUDGE ITS CREDIBILITY

A reason given by the Office of Technology Assessment for launching its major new study of home taping was that previous surveys typically had not provided enough methodological detail

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to allow the reader to judge whether the methods used would be likely to create biases in the findings. Yet literally on the heels of OTA's thorough, well documented, and impartial study, the tendentious new Roper report provides minimal information about its design and execution.

OTA criticized the absence, in some of the previous survey reports, of any verbatim record of the questions put to the respondents. Survey results are useless without the survey instrument. Yet the Roper report includes the wording of only <u>some</u> of its questions and does not include a copy of the complete instrument. In consequence, the reader is left with the following concerns unanswered:

- <u>How was the survey introduced and explained to potential respondents</u>? Was the introduction such that a fully representative sample of the general population would be motivated to take part, or might those agreeing to participate be the people most interested and active in audio taping? Was the introduction worded in a way that suggested a particular viewpoint on the issues or behavior to be discussed? Was the sponsorship of the survey mentioned?

- <u>What else did the interviewers say to the respondents</u>? Does the Roper report mention results from all of the questions asked in the interview? Were respondents given any other instructions or explanations beyond those mentioned in the report?

- <u>How were the questions ordered</u>? What was the logical flow of the interview? Could the ordering of the questions have influenced any of the reported responses?

The Roper report is equally silent about other elementary considerations of sample design, response rate, and demographic characteristics.

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B. THE ROPER SURVEY'S METHODS OF PROJECTING DAT PURCHASE AND USE ARE HIGHLY SUSPECT

From the limited information provided, there appear to be serious flaws in the way the survey collected information both on consumers' interest in purchasing DAT recorders and on their likely use of such recorders.

1. Those Surveyed Had Only Biased and Partial Information

Projecting consumer behavior with regard to products not yet in the marketplace is difficult at best. Asking hypothetical questions of the "What would you do if . . . ?" type is well known to lead to significant overstatements of likely behavior. Purchasing a DAT recorder costs actual dollars; saying "yes" to a telephone interviewer does not.

This problem is exacerbated when the new product is so innovative that it must be described or explained in order for respondents to visualize how it works. The more effort that is put into the explanation -- the longer and more elaborate the verbal description, the glossier the photographs -- the more likely the respondent is to feel that the "proper" response is to endorse the product. For these reasons and others, direct hypothetical questions of the "Would you buy . . . ?" type are rarely used alone in serious new product research.

The Roper survey appears to have made little effort to avoid these problems and their associated bias. The interviewer was instructed to read a long, 91-word description of purported characteristics of a DAT recorder; this description takes roughly 30-35 seconds to read at a steady pace. Instead of avoiding any words in the description that could encourage a positive, emotive response, the second sentence is replete with positive prompts:

> "Digital audio tape recorders record sound in a completely different manner from other tape recorders. Because of this technological breakthrough, the equipment has ultra high fidelity." (Emphasis added).

This reads more like advertising copy than a neutral description.

The questionnaire then asked directly "Putting aside cost considerations, how interested do you think you might be in owning a digital audio tape recorder?" This wording ignores the possibility of bias and, by specifically removing cost from the respondent's consideration, possibly enhances that bias.

The report then (presumably, although it is not clear on this point) further exaggerates the positive response to DAT recorders by classifying all those opting for the prespecified responses "very interested," "somewhat interested," or "slightly interested" as "interested" in owning a DAT recorder. Only those respondents giving the response that they were "not at all interested" were discounted as interested in owning a DAT recorder. Apparently, even after hearing the long and

positively-charged description of a DAT recorder, about 57% of the sample responded that they would be "not at all interested" in owning one, no matter what the price was.1/

There followed, it seems, some questions about purchase likelihood at different price levels, although the report does not reveal the wording of these questions. The Roper Organization concludes that "three-fourths of those with some interest in a DAT recorder express some degree of purchase likelihood at the lower price level," (at least $300). So by inference, about a third of the general population (that is, three-fourths of 43%) is judged by the very loose criteria used by Roper to have "some likelihood" of purchasing a DAT recorder. That this figure is likely to be a significant overestimate is apparent from the question wording and the analysis method. Its lack of relationship to any likely near-term reality can also be judged when compared with the 1988 penetration of CD players (available at a price lower than $300), estimated by the OTA survey to be 15% of the population.2/

2. Projection of Likely DAT Use Is Unreliable

Roper did not limit the subsample asked about potential DAT use to the (inflated) 32% subsample who indicated "some degree

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1/ The Roper report says that 43% of respondents "express some degree of interest in owning the equipment."

2/ OTA Report, at Table 2-6.

of purchase likelihood" at the minimum $300 price level. Rather, the study apparently went back to the 43% of respondents who expressed "some degree of interest in owning the equipment," even though some of these failed to show even "some degree of purchase likelihood."

Information on DAT use was reported to have been collected with this question:

> "I'm going to read you a number of things that you might record with the DAT recorder. As I read each one, please tell me if you think it is something that you, personally, would tape with a DAT recorder."

There are at least two problems here. First, note that a second hypothetical question is now being added on top of the first one. People who assented to being at least "slightly interested" in owning a DAT recorder -- whether or not they thought that they would buy one -- are being asked how they might use the equipment. Second, because of the way the question is asked, no information is collected on <u>intensity or frequency</u> of use here; the implication is might you <u>ever</u> use it to . . . ?" Even if the responses were reliable -- and because of the various sources of bias that is very doubtful -- these percentages would give no meaningful information about the extent of various types of use of DAT recorders.

In addition, asking a question tantamount to "would you ever . . . ?" compounds the hypothetical questions about interest, and encourages respondents to overstate the number of uses they would make of DAT recorders. Once a respondent

expressed some enthusiasm for owning or purchasing this "technological breakthrough" with "ultra high fidelity," there presumably was some implicit obligation to claim many uses to justify their interest; and for those less enthusiastic in their interest, the responses about how they would use the DAT recorder have to be highly speculative.

The base for these results is the subset who said they both had some interest in owning a DAT recorder and said they would use it to make tapes. In fact, only 52% of those who said they were somewhat interested in a DAT recorder said they would make tapes with one.3/ Thus, the reported percentages should be cut roughly in half to arrive at the percentage of those interested in a DAT recorder who, according to Roper, would (ever) tape from those various sources.

The subsample used for all subsequent analysis of projected DAT use is the 371 people who are both "interested in owning" a DAT recorder and who think that they would use it to record tapes. As we have demonstrated, this group comprises substantially more people than one could reasonably expect to purchase DAT recorders. One cannot determine how representative of DAT recorder purchasers this group might be.

3/ There appears to be some error here. If the people interested in owning constitute 43% of the sample, that percentage implies between 640 and 654 of the 1,504 people in the full sample. So the 371 people who might make tapes ought to translate to either 57% or 58% of those "interested in owning."

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The Roper report stridently claims that its "most striking finding is that 100% of those interested in using DAT equipment for taping will use it tape pre-recorded music." Yet the Roper figures rely on people rather than on taping occasions. Thus, due to the problems with the subsample analyzed and the focus of the question, the Roper report vastly overstates such recording and vastly understates other DAT uses.

3. "Only 52% of Those Interested in DAT Would Make Tapes"

The result that only 52% of those "interested in owning" a DAT recorder thought that they might use it for making tapes is telling in its own right. Despite the biases described above, by inference the remaining 48% said they would not use a DAT recorder to record at all, merely to listen. Such anomalous answers at this stage probably reflect a lack of realism by respondents from the cumulative effect of the hypothetical questions, or a lack of interest from persistent questioning on a topic for which some (perhaps many) respondents had expressed marginal enthusiasm.

4. Evaluation of Changes in Taping Behavior with DAT Recorders is Highly Speculative

The questions as to use were asked of a significantly larger group of people than would, in fact, be likely to purchase. Having erected a hypothetical situation where it is assumed that the respondent has spent a considerable amount of money on the DAT

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recorder that has been described, the respondent is asked to justify the wisdom of the hypothetical investment by discussing how it would be used. The results, piling extrapolation upon hypothecation upon speculation, would be useless for any serious market research and are useless from a policy perspective as well.

In summary, the question wordings and the analysis methods employed by Roper to project how DAT recorders might be used suggest that the reported findings are, at best, highly speculative and unreliable.

C. FINDINGS ON CURRENT TAPING BEHAVIOR

The Roper survey purports to cover the same ground as the OTA report, but it does so much less carefully or reliably. Thus, the Roper results add essentially nothing to what the OTA survey told us about home audio taping behavior. Where the Roper results appear to conflict with those of the OTA survey, the Roper results are either based on much less carefully or usefully worded questions; or their basis is so mysterious that the Roper findings must be discounted and the OTA results accepted as more reliable.

1. "Infringing" vs. "Non-Infringing" Taping

The Roper analysis of "infringing" home taping behavior is based on number of people rather than the number of taping occasions. This method can substantially distort findings. For example, the Roper report shows that 79% of the tapers did some taping of copyrighted materials. If one looks to taping

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occasions, however, the OTA study found that nearly three in four (73%) of taping occasions in the past month involved taping things other than pre-recorded music.4/ Furthermore, the OTA survey asked respondents about their behavior during the past month, compared to the Roper survey's examination of past year behavior. Behavior recollected over the course of a whole year is subject to greater distortion.

2. Number of Tapes Made and Purchases Displaced

Accurately estimating the number of tapes made and the effect on purchases pose the greatest challenges for survey techniques and have been the two most controversial issues in the home audio taping dispute. Past disputes over these issues, and over inadequacies of past surveys in addressing these issues, were important reasons why OTA carried out its own survey. The OTA survey went to considerable effort and care in its attempt to collect information bearing on these issues. Questions about taping were focused on the most recent tape made in order to improve the quality of recall. The relationships between taping and purchase behavior were probed in an extensive series of questions (although one that unfortunately did not avoid the uncertainties of asking respondents to speculate in response to hypothetical questions). Still, the inherent difficulties of trying to make these estimates is so great that the OTA Report

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4/ OTA Report, at 24.

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came to no clear conclusions about either.[5/] Under these circumstances, one might have thought that the Roper report would have been careful to document the methods by which it formed its estimates if it expected anyone to have any confidence in its results.

Yet it is when estimating its measures of the total extent of taping of broadcast or prerecorded music and of displaced sales that the Roper report is most coy about methods. Apparently, resort was had to the infamous black box:

- The report does not provide the wording of any of the questions from which these estimates are derived.
- The report does not report the responses to any underlying questions, only the estimates themselves.
- The report provides no information of any kind about how in fact these estimates were derived from respondents' answers.
- The report of the estimates of number of tapes made does not tell us whether the respondents were asked directly for twelve-month totals of tapes made, or one-month totals, or whether taping frequency was inferred from the timing of the most recent taping occurrence.
- The report tells nothing about how the survey tried to distinguish number of taping occasions from the numbers of separate blank tapes recorded at particular taping occasions, or how the survey determined the number of blank tapes filled.
- The report provides no way of knowing whether the Roper

5/ It should be pointed out that the Roper Report and OTA survey results on the amount of home taping are not comparable. The OTA survey estimated only the number of "tapings," and was careful to warn that the estimates should not be interpreted as estimates of the number of blank tapes used or of the number of albums taped. Roper, without explanation, simply claims to have estimated the number of tapes made. See OTA Report, at 152-53.

survey even made any attempt to come to grips with these issues.

- The report gives no information on how the Roper survey deals with the acknowledged difficulties that respondents have in recalling past behavior accurately.

The OTA survey dealt with the challenge by focusing questions on "the last tape made." The Roper survey gives no information about whether or how it dealt with the problem of accurate recall. Put simply, the Roper report fails to provide a basis for having any confidence in its estimate of the amount of home taping from broadcasts or prerecorded music.

The inadequate foundation of the Roper estimate is further revealed by its complete inconsistency with data on blank tape sales. The Roper estimate of the number of tapes made in the past year is almost exactly three times the number of blank tapes sold in 1989, despite the fact that a substantial proportion of these blank tapes sold were used for business purposes or for recording non-copyrighted material.6/

The Roper report is similarly uninformative about how it derived its estimates of displaced sales:

- The report is silent about the wording of the question(s) used to assess purchase displacement, and the report is silent about how its estimates are derived from responses to these questions.

6/ Blank tapes sales in 1989 were roughly 360 million units. See OTA Report, at 201 and Electronic Industries Association data showing blank tape sales declined by 6.8% from 1988 to 1989. Re-use of blank tape cannot explain the discrepancy between the Roper estimate and blank tape sales because the OTA Survey found that 70-80% of home tape recordings are made with new blank tape that has not been used before.

- The report says nothing about how it dealt with the problems of accurate respondent recall, or of getting reliable responses to hypothetical questions of the type, "what would you have bought if you had not made the tapes you did make?"

- The report says nothing about whether it asked questions to try to find out if the respondents would have been able to purchase the same recordings that were taped -- a serious issue when many home audio tapes are made up in part or whole from selections or from older recordings that may no longer be available.

- Finally, on the evidence of the report, the Roper survey ignores the stimulative effects of home taping on purchases of recordings that is explored and documented by the OTA survey.

The Roper finding as to how often respondents listen to homemade tapes illustrates the unreliability of its methods. The Roper survey said that more than half (54%) of the respondents listen to tapes that have been made either by themselves or by someone else about the same amount (34%) or more (18%) as they listen to to purchased tapes. This conflicts sharply with the OTA finding that the last recorded music listened to was a copy in only 10% of the cases.1/ The OTA survey looked to the "last music listened to." What did Roper ask?

None of the previous surveys on home audio taping behavior have been able to solve the problems of estimating the effect on sales of home audio taping. The OTA survey claims nothing more than to have estimated a sales displacement rate that was an "upper bound" for an actual displacement rate that was "probably

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1/ OTA Report, at 8.

much lower."8/ With no documentation of questions or description of method, the Roper survey generates no confidence at all.

3. Exchange of Tapes

There is a marked contrast between the findings of the Roper and the OTA surveys on the subject of exchanging tapes made from broadcast or prerecorded music. The difference is likely to reflect question wording decisions, at least in part. OTA, in questioning about the most recent experience of making such a tape (within the last 12 months), asked (at Q.45):

> "Were you making the tape(s) for yourself, another member of your household or someone else?"

Approximately 28% of the tapers aged 15 or older were making the tape(s) for someone other than themselves.

The Roper respondents, by contrast, were asked:

> "From time to time, do you exchange tapes that have been made from pre-recorded music with family, with friends, with classmates, or through some kind of club?" (Emphasis added).

Approximately 57% of the Roper survey tapers made a positive answer, more than twice the proportion indicated by the OTA survey. The Roper wording, however, is not linked to any specific instance of taping, nor even to any past time limit. "From time to time, do you . . . ?" may be interpreted as something akin to "Have you ever . . . ?" The "have you ever . . ." approach to surveys was identified by the OTA staffers as one of the oldest

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8/ OTA Report, at 158.

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tricks in the book -- and a reason that impartial surveys are needed.

4. Types of Material Taped

As with questions about hypothetical use of DAT recorders, the Roper survey phrased questions about current taping so that they yielded little information about the extent to which respondents tape from various sources. Respondents were asked:

> "I'd like to know what kinds of things you recorded the music from. As I read each possible source, please tell me if you taped music from it in the past 12 months. Did you tape music from . . . ?"

The answers do not reveal anything about how much respondents tape from each source, and thus provide much less detailed information on taping behavior than does the OTA survey. By focusing on the material recorded on the last tape made, the OTA survey questions focused respondent recall much more accurately, and also collected much more specific information. Again the Roper report adds nothing to what the OTA survey reveals about consumer taping behavior.

D. ROPER FINDINGS ON THE FAIRNESS OF A ROYALTY TAX

The Roper survey found that opinion is "somewhat divided" on whether it would be fair to impose a royalty tax on the purchase of blank tape or recording equipment to pay copyright owners for their works. Of the total respondents, Roper reported that 39% responded that a royalty fee would be fair,

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49% disagreed, and 12% had no opinion. How many Members of Congress are elected with 39% of the vote?

Yet these lopsided results came from a rigged election. As a prelude to asking respondents about the fairness of a royalty tax, the question pointed out that music creators are not paid when their music is copied. Yet the Roper survey did not discuss the unfairness of charging a fee for tapes and equipment that are used for purposes other than copying prerecorded music. OTA asked the same questions more neutrally, resulting in a landslide vote against royalty taxes.9/

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9/ OTA Report, at 164-65.

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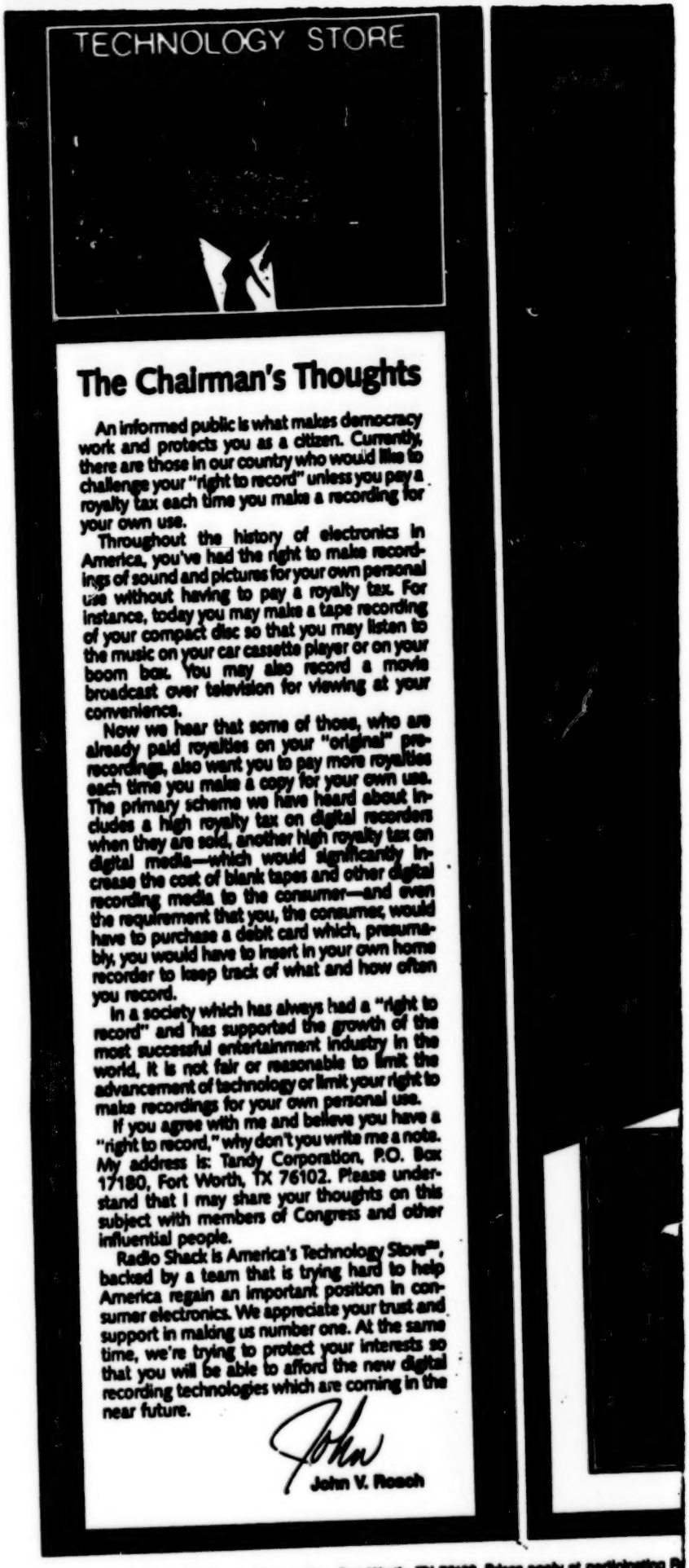
Attachment 3



The Chairman's Thoughts

An informed public is what makes democracy work and protects you as a citizen. Currently, there are those in our country who would like to challenge your "right to record" unless you pay a royalty tax each time you make a recording for your own use.

Throughout the history of electronics in America, you've had the right to make recordings of sound and pictures for your own personal use without having to pay a royalty tax. For instance, today you may make a tape recording of your compact disc so that you may listen to the music on your car cassette player or on your boom box. You may also record a movie broadcast over television for viewing at your convenience.

Now we hear that some of those, who are already paid royalties on your "original" prerecordings, also want you to pay more royalties each time you make a copy for your own use. The primary scheme we have heard about includes a high royalty tax on digital recorders when they are sold, another high royalty tax on digital media—which would significantly increase the cost of blank tapes and other digital recording media to the consumer—and even the requirement that you, the consumer, would have to purchase a debit card which, presumably, you would have to insert in your own home recorder to keep track of what and how often you record.

In a society which has always had a "right to record" and has supported the growth of the most successful entertainment industry in the world, it is not fair or reasonable to limit the advancement of technology or limit your right to make recordings for your own personal use.

If you agree with me and believe you have a "right to record," why don't you write me a note. My address is: Tandy Corporation, P.O. Box 17180, Fort Worth, TX 76102. Please understand that I may share your thoughts on this subject with members of Congress and other influential people.

Radio Shack is America's Technology Store℠, backed by a team that is trying hard to help America regain an important position in consumer electronics. We appreciate your trust and support in making us number one. At the same time, we're trying to protect your interests so that you will be able to afford the new digital recording technologies which are coming in the near future.

John V. Roach

2 ©Copyright 1991 Tandy Corporation, Fort Worth, TX 76102. Prices apply at participating R

Attachment 4

The Chairman's Thoughts

This month I'd like to address two subjects I believe many of you have an interest in because they concern your rights as a consumer.

The first subject regards your right to make a recording for your own use. There are many legitimate uses for recorders, including taping messages to send to friends and relatives, recording music to listen to at home or on-the-go, and taking audio "notes" of lectures and meetings for study or review. Unfortunately, some music publishers and recording artists believe they are being "ripped off" by consumers who make recordings. As a result, music industry representatives have petitioned Congress and the courts to stop electronics innovators from introducing state-of-the-art sound recording systems. In their opinion, "you" don't have the right to this technology. It's difficult for me to understand why there is an objection to new technologies when existing ones have made possible the growth of a huge music industry. At Tandy Corporation, we're making substantial investments in research and development of new technologies, and also in USA manufacturing facilities. We hope you get to hear the results.

The second subject concerns your right to privacy, and relates to our age-old practice of keeping track of our customers' names and addresses. Recently I talked to a customer who stated that he'd gone to great lengths to determine who sells their mailing lists and who doesn't. His conclusion was that Radio Shack doesn't sell their list. And he's absolutely right—we use our mailing list only in ways that benefit you. For example, we use it for informative mailings like the one you're reading, and for warranties and returns. We believe your privacy should be protected, and we haven't broken that trust. The four-digit number we use to save time in processing your sale is also intended to give you faster service and yet retain your privacy. We'll continue to work to earn and improve upon our good relationship with our customers.

Now for the sales pitch. Radio Shack truly *is* America's Technology Store℠. We have more stores, more service centers, more USA plants and more employees than any other consumer electronics retailer/manufacturer—all to ensure your satisfaction.

As we enter the gift-giving season, I hope you'll consider the quality and satisfaction that only Radio Shack can provide. You deserve to buy from the biggest and most reliable—Nobody Compares.

John V. Roach

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GENERAL COUNSEL
OF COPYRIGHT
JAN 31 1991
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Comment Letter
RM 90-6
No. 20

Before the
COPYRIGHT OFFICE OF THE UNITED STATES
Library of Congress
Washington, D.C.

Digital Audio Broadcast and Cable Services; Copyright Office Study	Docket No. RM 90-6

REBUTTAL COMMENTS OF THE © COPYRIGHT COALITION

A. Introduction.

The © Copyright Coalition ("© Coalition") submits these comments in rebuttal to submissions of other parties in Docket No. RM 90-6, the Copyright Office's ("Office") inquiry into the copyright implications of digital audio broadcast and cable services.

The Notice of Inquiry, published in the Federal Register of October 24, 1990,[1/] announced that, in response to a Congressional request, the Office would study how the rights of creators and copyright owners are protected with respect to digital audio transmissions.[2/] To assist in its analysis, the Office invited public comment on seven specific questions, most of which related to the potential

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1/ Digital Audio Broadcast and Cable Services, Notice of Inquiry, 55 Fed. Reg. 42916 (Oct. 24, 1990).

2/ Id., at 42917.

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impact of digital audio transmission services on home audio taping behavior.[3/] Several other questions indirectly raised the issue of whether the unique features of digital audio services warrant renewed consideration of public performance rights in sound recordings.[4/]

Thus the Notice of Inquiry, quite properly, called attention to two very distinct copyright problems. The first -- home taping -- affects all music and sound recording creators and rights owners deeply. The second -- sound recording performance rights -- is of special concern to American record companies and recording artists. Although linked by the advent of digital broadcast and cable services, these issues demand separate analyses and separate determinations as to whether remedial legislation is warranted.

The ° Coalition was established by the songwriter and music publishing communities in response to the threat of digital audio recording technologies, and this single issue remains the Coalition's clear priority. In its first-round comments, filed December 17, 1990, the ° Coalition detailed the extent to which current audio taping practices

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3/ See 55 Fed. Reg. 42917, questions (1), (2), (4) and (5).

4/ See id., questions (3) and (7). The first-round comments of the Recording Industry Association of America ("RIAA") focused "on the unfairness of the absence of a performance right [in sound recordings] in the digital audio broadcast/cable environment." RIAA comments, at 12.

harm American songwriters and their publishers and explained how the linked availability of digital audio transmission and digital audio taping technologies can be expected to fuel home taping and result in a substantial loss of royalty income.

Whatever conclusions the Office draws with regard to the sound recording performance rights issue, the fact remains that the ability to make digital copies from free digital audio broadcasts or subscription services stands as the ultimate inducement to copy at home and the ultimate threat to the copyright owners' right to control the reproduction of protected works. A public performance royalty for the owners and beneficiaries of the separate copyright in sound recordings will not provide a source of compensation for the home taping losses of songwriters and their publishers.

Digital audio services will transmit prerecorded music with the quality of a compact disc ("CD"). Copies made on digital audio recorders will be "perfect clones" of those prerecorded works, and even those made on analog cassette recorders will be of extremely high quality. In the near term, taping from digital audio services will mean lost sales for the record companies and lost mechanical royalties for songwriters and music publishers. Over time, taping from digital audio services may replace purchases of

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prerecorded CDs, cassettes and records as the primary way consumers obtain recordings of musical works.

The right to control the reproduction of protected works is the most fundamental aspect of copyright. According to the electronics industry's own projections, within the tenure of the 102nd Congress, tens of thousands of individuals will have the ability to make digital clones of music from digital sources.[2/] Unless Congress moves quickly to consider a right of remuneration in respect of home audio taping, the value of the reproduction right, and individual creator's incentive to create, will be seriously -- and perhaps permanently -- undermined.

Initial comments from groups that benefit from the uncompensated exploitation of works protected by copyright -- the so-called Home Recording Rights Coalition ("HRRC") and the National Association of Broadcasters ("NAB") -- focused almost exclusively on the home audio taping aspect of the inquiry.[3/] Predictably, both groups put forward long-discredited arguments in an attempt to show that home

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2/ Nunziata, DCC Is Hot Topic for Winter CES, Billboard, Jan. 12, 1991, at 5.

3/ NAB appears to have interpreted the Notice of Inquiry as suggesting that it might be appropriate to consider whether broadcasters should pay royalty, not in connection with the public performance of sound recordings, but rather to compensate for the music industry's home taping losses. The • Coalition has not suggested, and does not now contend, that commercial broadcasters' use of protected musical works should be subject to a home audio taping royalty.

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taping is a lawful, noninfringing activity that actually benefits copyright owners and creators. The ° Coalition responds to these claims below.

B. "Personal" or "Private" Copying Is Not Authorized or Exempted by the Copyright Act.

The HRRC opines that home taping is legal. The NAB believes that "Congress expressly determined that home taping of prerecorded music from over-the-air broadcasts for private use . . . was legitimate and sound public policy."[2/] Specifically, the HRRC and NAB argue that the Sound Recording Amendment of 1971 ("1971 Amendment")[3/] somehow authorizes the practice of home audio taping. As the Office knows, there is, in fact, no indication that Congress ever reached any such conclusion.

1. The 1971 Sound Recording Amendment Does Not Authorize or Exempt Home Audio Taping.

In support of their misleading and erroneous characterization of the law, both the HRRC and the NAB cite language that appeared in the House Committee Report accompanying the 1971 Amendment. The House Committee stated that

> In approving the creation of a limited copyright in sound recording it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under existing title 17 [the Copyright Act of 1909, as amended]. Specifically, it is not the intention of the

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2/ NAB comments at 2.

3/ Pub. L. 92-140, 85 Stat. 391 (1971).

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> Committee to restrain the home recording, from broadcasts or from records or tapes, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.[9/]

This statement, along with the few other scattered references to home audio recording in the record of consideration of the 1971 Amendment,[10/] occurred solely in the course of the House proceedings, which took place after Senate passage of the bill embodying the Amendment. No similar reference appears in the pertinent Senate proceedings. As Professor Nimmer aptly observed:

> It is also significant that the Senate never joined in the statement . . . from the House report. The language of the [1971] Amendment itself makes no reference to any form of home recording exemption, nor was any such exemption suggested during the Senate's consideration of the measure. Even if one assumes that all voting members of the House regarded a home recording exemption as being implicit in the statutory language, there is no justification for reading the exemption into the 1971 Amendment without evidence of similar intent on the part of those voting in the Senate.[11/]

It is also significant that the 1971 Amendment applied only to the protection of sound recordings. Musical

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9/ H.R. Rep. No. 487, 92d Cong., 1st Sess. 7 (1971).

10/ A similar reference is made in the brief exchange of remarks on the House floor quoted in the HRRC comments at 16.

11/ M. Nimmer & D. Nimmer, 2 Nimmer on Copyright § 8.05[C][1] (1989).

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compositions, the works in which the songwriters and music publishers represented by the ° Coalition have an interest, were already protected under the 1909 Act, and the 1971 Amendment did not purport in any way to affect music copyrights. Even assuming, arguendo, that a home audio taping exemption could be gleaned from snippets of the House Committee Report, it could not reasonably be construed as limiting the copyright in the underlying musical works.[12/]

2. The 1976 Copyright Act Does Not Authorize or Exempt Home Audio Taping.

The 1909 Copyright Act and its amendments were supplanted by Congress's comprehensive review and revision of the copyright law, completed in 1976. In enacting the 1976 Copyright Act ("1976 Act"), lawmakers gave no indication of an intent to accord privileged status to home audio taping. To the contrary, although portions of the 1971 House Committee Report were repeated in the House and Senate Reports on the 1976 Act, the earlier House Report's single reference to home recording is pointedly omitted.[13/]

12/ Id.

13/ The HRRC's reliance on Elektra Records Corp. v Gem Electronic Distributors, Inc., 360 F. Supp. 821, 824 (E.D.N.Y. 1973) to support its interpretation of the 1971 Amendment is misplaced. The case was decided under the 1909 Act, and did not consider the subsequent wholesale revision of the Copyright Act nor the intent of Congress as reflected in the new Act's legislative history. Moreover, although the rationale now advanced by the HRRC and NAB impressed the District Court in the Sony "Betamax" case, 480 F. Supp. 429, 444-446 (C.D.Cal. 1979), the Supreme Court majority, without

(continued...)

The only general references to taping activity appears in report language addressing section 107, the fair use provision of the 1976 Act. The House Report stated:

> [T]he reference [in section 107] to fair use "by reproduction in copies or phonorecords or by any other means" is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.[14/]

Unlike the stand-alone language of the House Report on the 1971 Amendment, this statement does reflect the views of both Houses of Congress. Senate conferees joined with their House colleagues in adopting the House position on section 107, including House amendments and proposed guidelines for classroom copying.[15/]

The HRRC simply ignores this clear indication of Congress's intent. Instead, it argues that the House Committee's general statement that the purpose of section

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[13/](...continued)
discussion, specifically disclaimed it as a basis for its decision, Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, at 430 n. 11 (1984), and the four-Justice dissent explicitly and persuasively rejected it, id. at 470-475, as had the three-judge Ninth Circuit panel, 659 F.2d 963 (9th Cir. 1981).

[14/] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5679.

[15/] See H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5811.

107 was to "restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way"[16/] should be construed as freezing the fair use doctrine in a manner consistent with its expansive reading of the 1971 House Report language.[17/] This characterization of the House Report is misleading at best, deceptive at worst. The entire provision, selectively quoted by the HRRC, provides:

> General intention behind the provision
>
> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially in a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[18/]

(Emphasis added.)

The HRRC further advises that "The Senate Report [on the 1976 Act] similarly confirms that off-the-air recording for convenience should be deemed fair use."[19/] This again misstates legislative intent. According to the

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16/ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-66 (1976), reprinted in 1976 U.S. Code Cong. and Admin. News 5659, 5680.

17/ HRRC comments at 16-17.

18/ Id.

19/ S. Rep. No. 94-473, at 65-66 (1975).

Supreme Court, "[t]he Senate Report endorsed the view that 'off-the-air recording for convenience' could be considered fair use under some circumstances"(emphasis added).[20/]

Quite plainly, the claim of a home audio recording exemption is not supported by the 1971 Sound Recording Amendment, by the 1976 Copyright Act or by the legislative history of either measure.

C. Home Audio Taping Is Not Fair Use.

As a second line of argument, the HRRC asserts that the Supreme Court's decision in Sony Corporation of America v. Universal City Studios, Inc. ("Sony Betamax") "more clearly affirmed" the legality of home audio taping from audio broadcasts. Again, the HRRC's characterization of the law is wrongheaded.

In Sony Betamax, a five-Justice majority of the Court held that the practice of making a video tape of a program broadcast free of charge to the general public for the purpose of viewing the tape at a later time and then erasing it -- a practice referred to by the Court as "time-shifting" -- was a fair use where a significant number of copyright owners affirmatively authorized the use, and no economic harm was demonstrated by the copyright owners who challenged the use. Four dissenting Justices would have

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20/ Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, at 448-449 n. 31.

found even the limited time-shifting use at issue in Sony Betamax to be infringing.

Home audio taping, and in particular digital audio taping from digital sources, presents issues distinctly different from the video tape time-shifting practices in Sony Betamax -- issues which were not addressed by the Court in its decision. The HRRC tries to shoehorn the facts of digital audio taping into the holding of the Sony Betamax decision, without success.

In general, the types of uses recognized by the courts as fair, and therefore noninfringing, are undertaken for the purposes listed in the first sentence of section 107: criticism, comment, news reporting, teaching, scholarship or research. This is not to say that the fair use doctrine recognized in section 107 is rigid; as shown above, Congress "structured the provision as an affirmative defense requiring case-by-case analysis."[21/] Four non-exclusive factors set forth in section 107 guide the courts' review. These factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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21/ Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549 (1984).

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(4) the effect of the use upon the potential market for or value of the copyrighted work.

Home audio taping, and in particular digital audio taping, cannot be justified as fair use under these criteria.

(1) The purpose and character of the use

In evaluating the purpose and character of the use, courts are to consider whether the use is "commercial" or for "nonprofit educational purposes." The HRRC states that "home tapers are not in business to reap huge financial profits at the expense of the music industry," so their taping for "private convenience and enjoyment" is nonprofit in character.[22/] This is a simplistic -- and an inaccurate -- view of the doctrine.

An analysis of the purpose and character of a challenged use does not look to whether the unauthorized user has reaped vast financial gains. The Supreme Court has made this plain. Balancing under this factor, the Court has said, should look to the private or personal benefit of the challenged use to the user of the protected work:

> The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit for the exploitation of the copyrighted material without paying the customary price.[23/]

22/ HRRC comments at 18.

23/ Harper & Row Publishers, 471 U.S. at 562.

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In the case of copyrighted musical works, the "customary price" is the royalty received by the songwriter and music publisher for each authorized phonorecord sold. An individual who tapes music off-the-air or from a subscription service, who copies a CD borrowed from a friend, or who trades or swaps homemade tapes gets the full use and enjoyment of the copyrighted works without paying the customary price. Such use is commercial for purposes of fair use analysis.

Moreover, unlike the time-shift viewer, who -- by the Court's own definition -- records, views and then erases or tapes over the copied program, the audio taper keeps his or her homemade tapes to play and enjoy again and again. This practice was referred to as "librarying" throughout the Sony Betamax litigation. Although the District Court in that case did not make a determination as to whether librarying was a fair use, the Court recognized that time-shifting and librarying of home copies differ significantly in their purpose as well as in their impact on the potential market for protected works.[24/]

24/ See Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. 429, 467-468 (C.D.Cal. 1979). The District Court did not make a determination as to whether librarying was fair use, primarily because the factual record before it, limited to evidence of video recording practices in the late 1970s (pre-video rental and pre-cable service), did not establish that many persons would library video tapes to any significant extent.

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The HRRC comments that making a second (and presumably a third or fourth) copy of protected music from a prerecorded CD, cassette or album one has previously purchased should be viewed as fair use. It offers several justifications:

- First, the HRRC says such copying should be excused because the majority of tapers who copy CDs or cassettes do so for the purpose of having a second copy for use in their car or "Walkman"-type personal DAT machine or stereo. (The HRRC glibly refers to this practice as "place-shifting" in an attempt to draw a parallel between such use and the practice of time-shifting sanctioned by the Supreme Court in the Sony Betamax decision.)
- Second, the HRRC asserts that audio tapers copy to "create" customized tapes of musical selections.
- Third, the HRRC states that tapers copy to keep their "originals" from wearing out.

All these attempts fail for the same reason. It is a fundamental principle of copyright law that the mere ownership of a copy or phonorecord does not convey any rights in the copyrighted work embodied in the object.[25/] To be sure, a purchaser of a CD has the right to dispose of that particular CD in any way he or she chooses (except that commercial rental is prohibited without the copyright owners' authorization).[26/] But it is equally clear that the purchaser does not obtain the right

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25/ 17 U.S.C. § 202; and see U.S. Copyright Office, Copyright Basics, Circular No. 1 (1989).

26/ 17 U.S.C. § 109.

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> to reproduce the works embodied in that CD (whether to place-shift or to keep the paid-for original from wearing out),
>
> to distribute additional copies (for use by friends), or
>
> to make derivative works (by reshuffling works on "customized" tapes).[28/]

The HRRC also misses the point when it contends that home taping is fair because the desire to avoid payment of the price of prerecorded originals does not motivate much taping behavior.[29/] Whether or not saving money is the taper's expressed intention, in each of the examples offered by the HRRC as justifiable noncommercial use, the taper in fact does -- in the Supreme Court's words -- "benefit from the exploitation of the work without paying the customary price." The individual who makes a second copy of prerecorded music for his car avoids paying the price of that second copy. The individual who tapes to "preserve" his originals does not have to buy a replacement copy when the first wears out. The individual who makes a selection tape does not purchase an authorized prerecorded collection of music performed by a favorite artist or reflecting a particular period or mood.

28/ Allen-Myland, Inc. v. International Business Machines Corp., 746 F. Supp. 520 (E.D. Pa. 1990) ("Section 109 does not authorize adaptation and reproduction of a copyrighted work.").

29/ HRRC comments at 29.

The home audio taper benefits from the use and enjoyment of protected works at the expense of the copyright owner. There is no basis upon which to excuse home audio taping as a nonprofit educational use.

(2) Nature of the copyrighted works at issue

An unauthorized use is more likely to be treated as fair use if the nature of the copied material is primarily informational. The courts have reasoned that copying factual works often "serves the public interest in the free dissemination of information."[30/] The more "creative, imaginative, and original" the work, the less likely that copying will be determined fair,[31/] particularly where the work is designed to entertain.[32/]

It is difficult to conceive of works that are more "creative, imaginative, and original" than musical compositions, or that are valued more by the public for their ability to entertain. The nature of musical compositions tilts decidedly against a finding of fair use.

(3) The amount and substantiality of the taking

Audio tapers -- even those who make tapes of their favorite selections from a variety of prerecorded sources --

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30/ Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966).

31/ MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981).

32/ Sony Betamax, 464 U.S. at 456 ("copying a news broadcast may have a stronger claim to fair use than copying a motion picture").

copy individual, protected musical compositions in their entirety.

As a general rule, the more substantial the taking from the copyrighted work, the less likely it is that the use will be excused as fair. As Professor Nimmer has explained, wholesale copying will militate against a finding of fair use in virtually every case because the more substantial the taking, the more likely it is that the copy will cut into the market for the protected work.[33/]

(4) Effect of the use on the potential market for or value of the copyrighted work

With its initial comments, the • Coalition submitted the results of a survey of consumer audio taping behavior conducted by The Roper Organization ("Roper Survey"). The Roper Survey confirmed the pervasiveness of current home audio taping practices and the extent to which consumers' ability to make perfect digital "clones" of protected music from digital sources can be expected to exacerbate an already serious problem.[34/]

Briefly, the Roper Survey demonstrated that:

- o An estimated 1 billion unauthorized music tapes were made in the 12-month period preceding the survey, with an estimated 322.5 million homemade tapes displacing sales.
- o One hundred percent of those interested in using a digital audio tape recorder for taping said that they would use it to tape prerecorded music. (In

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33/ 3 Nimmer § 13.05[D].

34/ • Coalition comments at 11-17.

this regard, projected DAT taping behavior differs significantly from current taping practices, where one-fifth of tapers reported that they used analog taping equipment only for non-infringing purposes.)

- Current tapers will tape more with DAT. One third of current music tapers said that -- if they had a DAT recorder available -- they would make more tapes of prerecorded music than they do now.

- The ability to make virtually perfect digital copies will lure non-tapers into the practice of home audio taping. Among people who do not now copy music but said that they would be interested in owning a DAT recorder, 52 percent said they would use DAT to tape prerecorded music.

- Audio tapers will tape more from digital sources with digital recording equipment.

  -- The Roper Organization found that the number of current tapers who would tape from a CD they purchase increases dramatically with the availability of DAT. Thirty-seven percent said that they now copy from purchased CDs, while 67 percent said they would probably copy the CDs they buy if they had DAT.

  -- The same alarming increase is evident in the level of interest in taping from borrowed CDs. Thirty percent of current tapers said they now copy from borrowed CDs; two-thirds said they would borrow a CD to copy on DAT.

The evidence that tapers and current non-tapers alike will copy more with digital devices should surprise no one, least of all the HRRC, whose consumer electronics industry supporters expect consumers to spend $900 and more to "be one of the first to push 'record' in the digital decade." (See sample advertisements reprinted in the attached exhibit.) DAT hardware manufacturers invite consumers to join the digital "revolution," while the HRRC claims that this staggering development in audio recording

technology is just another tape recorder that will not have a "big" influence on taping behavior.[25/]

The hardware companies want consumers to believe that DAT ushers in a new era -- the digital era -- in audio technology. Yet they want policy-makers to believe that the threat of digital-to-digital recording is no greater than that of making an analog cassette from a vinyl LP. Leading copyright scholars have recognized that the unique characteristics of works transmitted or otherwise made available in digital form challenge rights owners' ability to control unauthorized uses. Professor Pamela Samuelson, for example, has observed that

> While all of the improved reprography technologies pose threats . . . to copyright owners, what makes works in digital form so much more threatening is that the same technology one needs to use the digital work is the same technology that can be used to make multiple copies of the work -- and, even more frighteningly, can be used to make "perfect" copies. As it is sometimes put in the world of software engineering, selling computer programs (or for that matter, other works in digital form) is comparable to selling a customer the Ford automotive plant at the same time as selling him or her a Ford automobile. Each instance (or copy) of the program (or other work in digital form) has the potential to become its own factory.

(Footnote omitted.)[26/]

25/ HRRC comments at 10.

26/ P. Samuelson, Digital Media and the Changing Face of Intellectual Property Law, 16 Rutgers Computer & Technology L.J. 323, 325-26 (1990).

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Professor Samuelson's illustration not only reveals the powerful distinction between analog and digital audio technologies; it also points to a flaw in the HRRC's argument that past years' music industry profits should somehow preclude steps to address the copyright implications of home audio taping.[12/]

It is true that the U.S. music and recording industries have benefited from the growing popularity of the CD; industry revenues reflect this. But it is also a fact that the acceptance of this digital format has emerged in an environment where only digital playback equipment has been available to consumers. In other words, consumers who have desired the unrivaled quality of digital audio have had to purchase prerecorded digital discs. With the availability of digital audio services and digital audio recording equipment, the public will have another way to obtain digital copies of protected works: they will be able to make and own perfect copies without compensation to the

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12/ The HRRC suggests that digital audio transmission and recording technologies will result in no "demonstrable injury" to the music or recording industries. HRRC comments at 13. The electronics industry lobby implies that unless the music community can demonstrate an overall decline in revenues, it cannot show that it is harmed by home taping. The HRRC offers no support for this "financial distress" test, and, indeed, there is none. Section 107's inquiry into "the effect of the use on the potential market for . . . the copyrighted work" is not gauged by whether a rights owner makes a profit in spite of the challenged use. It is sufficient to show that, but for the challenged use, the rights owner would be able to earn more through legitimate exploitation.

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rights owners and creative individuals who made the work available. The industry's future vitality in this changed environment is by no means assured.

The HRRC's claim that the "human factors" of audio taping will be sufficient to dampen tapers' interest in copying from digital audio broadcast or cable services is similarly unpersuasive.[39/] According to the HRRC, the time involved in waiting for one's favorite selections to be played or in sitting by the recorder while the tape is made will discourage some tapers, while others will not wish to take the time to "zap" out commercials and announcements. Even assuming that these claims have some modicum of credibility with regard to taping from digital audio broadcasts, it is clear that with regard to copying from digital cable services they have none.

As RIAA showed in its initial comments, digital cable services will offer commercial-free and announcer-free programming designed to attract "listeners" who favor a particular genre, or even a particular artist. Advertising stresses that digital cable can substitute for CD purchases and, in fact, encourages taping. For example, Digital Cable Radio tells its potential subscribers that with its advanced audio service there is "no need to spend a fortune on a CD library" and urges them "to record the work of a favorite

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39/ See HRRC comments at 10-13 and notes accompanying the text.

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artist from the finest quality audio available."[39/] Digital Planet boasts that its service has a "[f]riendly tape recorder interface."[40/] Moreover, additional conveniences such as program guides that list playing times and the availability of "pay-per-listen" programming increase the attractiveness and ease of taping from such services.

The evidence shows that home audio taping has a negative impact on the market for prerecorded musical works, and that digital taping from digital sources can be expected -- by tapers' own projections -- to increase levels of taping. There can be no doubt that audio taping from digital sources, including digital audio cable and broadcast services, will harm the potential market for copyrighted music.

D. The Office Should Carefully Scrutinize the OTA Report and Data.

The HRRC and NAB comments rely extensively on a 1989 Office of Technology Assessment ("OTA") report entitled "Copyright and Home Copying: Technology Challenges the Law" ("OTA Study") to support their claims that taping from digital audio services in no way threatens the music

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39/ RIAA comments, attachment 3.

40/ RIAA comments, attachment 4.

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industry.[41/] The HRRC, in particular, touts the OTA Study as an "impartial" analysis of home taping and its impact.

In typical self-interested fashion, the HRRC warmly embraces OTA's approach to home taping and the copyright law, while cautioning the Copyright Office of the United States -- the body that advises the Congress on matters of copyright law and policy -- that the Office's "assumptions" about home audio taping are misguided. The HRRC states flatly that "[h]ome taping from broadcasts is clearly legal under the Copyright Act" (emphasis in the original).[42/]

As shown above, the HRRC supports this view of the law with a selective reading of the statute and an expansive view of the cases decided thereunder. Its presentation of the facts about home taping, as gleaned from the OTA study, is no less flawed.[43/]

It should be noted that, although the OTA Report was submitted to Congress in 1989, OTA's opinions concerning so-called "private" use and the copyright law, its

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41/ U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, DC: U.S. Government Printing Office, Oct. 1989).

42/ HRRC comments at 3-4.

43/ The HRRC's satisfaction with the outcome of the OTA survey should come as no surprise. The "impartial" Survey Working Group established by the OTA for this project included counsel to the HRRC, but did not include representatives of creator or copyright owner groups.

"findings" based on a related consumer survey, and the conclusions it draws from the various "contractor reports" it commissioned have never been subjected to public scrutiny or debate. Neither the House nor Senate has held a hearing on the OTA Report or the issues it raises. Faithful reliance on the views expressed by the OTA is not incumbent upon the Office. This is especially true in light of the serious concerns about the survey methodology and the focus of the contractors' inquiries raised by affected rights owners from the earliest stages of OTA's review.[44/]

The Office has been asked by Congress for its independent, expert assessment of the impact of digital audio technologies on creators and copyright owners. "Direct electronic delivery systems," such as digital cable and satellite services, were addressed in only two pages of the 200-page OTA report; "free" digital audio broadcast was not addressed at all.[45/] Moreover, the OTA survey did not anticipate the availability of digital audio recording devices, let alone the impact of digital taping from digital audio services. The rapid pace of developments in audio technology has given policy-makers every reason to request a thorough and comprehensive evaluation of the home taping dilemma and other copyright issues these technologies raise,

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[44/] See OTA Report at 192.

[45/] See OTA Report at 50-51.

and the Office should not, as the HRRC suggests, defer to the earlier and untested views of the OTA.

To the extent that any weight is given to the OTA Report, the Office should evaluate separately the data generated by the OTA-commissioned survey and the conclusions OTA draws from those data. While the OTA Report generally conveys the message that home audio taping is probably a lawful, beneficial activity, a careful review of the actual survey results provides a very different picture of the home audio taping problem.

The OTA Report Confirms That Home Taping Is Extensive

- Half the survey respondents reported copying music from a record, CD, or prerecorded tape at some time in the past. (p. 153)

- Nearly half of the respondents reported that they had made an audio tape of music from radio or television sometime in the past. (p. 152) OTA projects that there were approximately 439 million "past-year" tapings of music from broadcast sources. (p. 154)

- The number of households with cassette player/recorder equipment more than doubled over ten years, from 38 percent in 1978 to 94 percent at the time of the OTA survey. (According to OTA, the "survey findings suggested that virtually everyone aged 10 and older had immediate access to the technology to copy music recordings.") (pp. 147-148)

The OTA Report Confirms That Home Taping Displaces Sales of Prerecorded Music

- Fifty-seven percent of respondents who copied CDs, albums or cassettes, thought they could have purchased the material if they wished, and 53 percent of those making copies for themselves thought that they would have purchased the material if they could not tape. The survey found that a somewhat reduced number -- 42 percent -- of

tapers who made taped copies to give to persons other than family members would have purchased the material if they could not tape. (OTA draws the bizarre conclusion that "[t]his data suggests that home taping for others is a marginal activity for most tapers." A more logical conclusion would be that home tapes made by the taper for his own use are more likely to displace sales than home tapes made for persons outside his family.) (p. 158)

- At least 58 percent of homemade tapes were made from non-purchased sources, including broadcasts (29 percent); albums, CDs and cassettes borrowed from others (22 percent); and other homemade tapes (7 percent). By comparison, only 37 percent were made from albums, CDs or cassettes purchased by the taper (defeating the HRRC's contention that most tapers copy music from sources they "own".) (pp. 150-151)

- The number of individuals who regularly copy but do not purchase prerecorded music has increased 25 percent over the past decade (from 20 to 25 percent of the taping population). (p. 152)

- Sixty-nine percent of those who made a tape for themselves from radio or television broadcast said the last tape they made was to keep, not to use temporarily. This figure was eighty-five percent for those who taped from CDs, albums or cassettes. (OTA was forced to acknowledge that "[t]his is in sharp contract to the pattern for videotaping.") (p. 156)

When OTA's conjecture is stripped away, its survey data, like the results of the Roper Survey, reveals home audio taping to be a widespread practice that displaces sales of prerecorded originals. The harmful effects of this practice on the interests of music creators and rights owners is not -- as the HRRC suggests -- offset by some "stimulative" effect on music sales.

The OTA Report Does Not Demonstrate a "Stimulative" Effect of Home Taping on Music Sales

The HRRC claims that "[w]hile OTA found the survey data on purchase stimulation were insufficient to quantify the impact of home taping on purchasing, OTA verified the existence of the 'stimulative influence of home taping on music purchases,' and that home tapes 'must be considered to have some promotional value.'"[46/] (Emphasis in original.) In fact, OTA stated only that "the survey data did suggest the likelihood of a stimulative influence of home taping on music purchases."[47/] (Emphasis added.) OTA draws this nebulous conclusion from two factors, neither of which lend support to the conclusion:

- The data showed that 24 percent of those purchasing prerecorded materials had, prior to making the purchase, heard the artists or the music on a homemade tape. From this, OTA suggests that home tapes may serve to broaden audience awareness of performers or recordings, and thereby stimulate sales. (p. 159) Given the numerous possible motivations for purchase decisions and the other possible ways in which to be exposed to musical compositions (air play, for example), this factor cannot be relied upon to demonstrate that home taping stimulates sales.

- OTA further speculates that home taping may stimulate sales because 14 percent of music tapers expect to tape their purchases. (p. 159) This finding alone does not support the conclusion that the desire to tape motivated the purchase, or that the purchase would not have occurred if the taper could not tape.

[46/] HRRC comments at 28, quoting the OTA Report at 159.

[47/] OTA Report at 159.

The OTA Report contains no hard data to show that home taping stimulates any music sales, let alone that the practice stimulates sales to a degree that might recover even a small fraction of the sales it displaces. The data do, however, evidence displaced sales, despite OTA's tendency to downplay their significance. OTA claims that, owing to the small size of the relevant survey sample and the speculative nature of its own questions, at most an estimated 22 percent of recent taping incidents displaced sales of prerecorded material. The actual data reveal that

> A net of 38 percent of taped albums were reported as would-be purchases. Respondents indicated that nearly 5 of every 10 taped albums are would-be purchases, but that one of these 5 would displace another purchase, leaving the net effect at nearly 4 out of 10. This is roughly the same figure reported by Warner Communications in 1982 . . . [48/]

The OTA report does not overcome the overwhelming evidence that digital-to-digital recording will harm the music community.

E. Recommendations.

The Copyright Office's report on digital audio broadcast and cable services provides an opportunity to advance a well considered approach to the unique issues raised by these developments and related recording technologies.

48/ OTA Report at 206 n. 117.

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The current law protects copyright owners against the rampant appropriation of their works through home audio recording, but the remedies available through legal action do not hold the ultimate "solution" to this problem. Legislative changes are required to ensure that new technologies for disseminating and copying protected works do not shift -- perhaps irretrievably -- the policy balance between the interests of creators of works and the general public.

In its initial comments, the • Coalition outlined the framework for a comprehensive and equitable solution to the technology-driven problem of home audio taping. The • Coalition urges the Office to recommend to Congress the enactment of legislation establishing a modest royalty on home taping devices to compensate rights owners and creators for home audio taping losses. A royalty system best preserves the tandem goals of the copyright law: to sustain the incentive to create, while promoting the public's access to new works.

The • Coalition does not seek to establish as a matter of copyright law or policy the imposition of measures that block all home recording. In its initial comments, the • Coalition advocated that a home taping royalty be coupled with the requirement that all digital recording technologies incorporate Serial Copy Management System ("SCMS") copy-limiting technology. SCMS does not begin to address the

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copyright issues raised by digital audio recording devices, but it does place some (albeit circumventable) curbs on the infinite cloning capabilities of such devices. The ° Coalition has expressed support for a "debit card" system in principle, and has proposed that the entire music industry begin the process of fully exploring its feasibility. However, pending availability of a truly effective technical approach to a "debit card" system, imposition of a royalty on home taping devices is essential to assure rights owners and creators of compensation for home audio taping losses.

The ° Coalition believes that lawmakers would benefit from a thorough survey of existing and contemplated home taping royalty legislation, and of collection and distribution systems, throughout the world; it urges the Office to undertake such a survey. The information supplied in Exhibit B of the ° Coalition's initial filing may assist the Office in this regard. However, further consultation with rights owners groups and collecting societies, foreign copyright authorities, the Commission of the European Community and the World Intellectual Property Organization may also be desirable. Exchanges with private and public sector representatives will not only assist the Office and lawmakers in assessing policy options, but may ultimately promote the U.S. Government's efforts to achieve adequate and effective copyright protection worldwide.

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Since the printing press, copyright law has evolved along with technology to accommodate new uses of works, new user groups, and even new subject matters. We can -- and, indeed, we must -- expect to adjust copyright law to the challenges of the digital age.

That the Congress and the Office have had the foresight to examine the impact of digital technologies before commercial enterprises and consumers have invested in them is laudable. The early initiation of this inquiry assures fairness to all concerned. The © Coalition and its constituent organizations appreciate the opportunity to participate in the comment process launched by the Notice of Inquiry, and look forward to the Office's report.

Respectfully submitted,

© COPYRIGHT COALITION
205 East 42nd Street
New York, New York 10017
212/370-5330

George David Weiss
President
The Songwriters Guild of America

Morton Gould
President
American Society of Composers, Authors and Publishers

Frances W. Preston
President
Broadcast Music, Inc.

Edward P. Murphy
President
National Music Publishers' Association, Inc.

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Attachment

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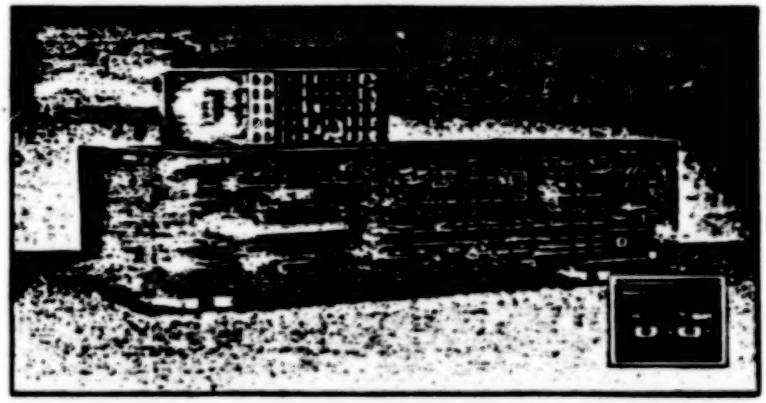

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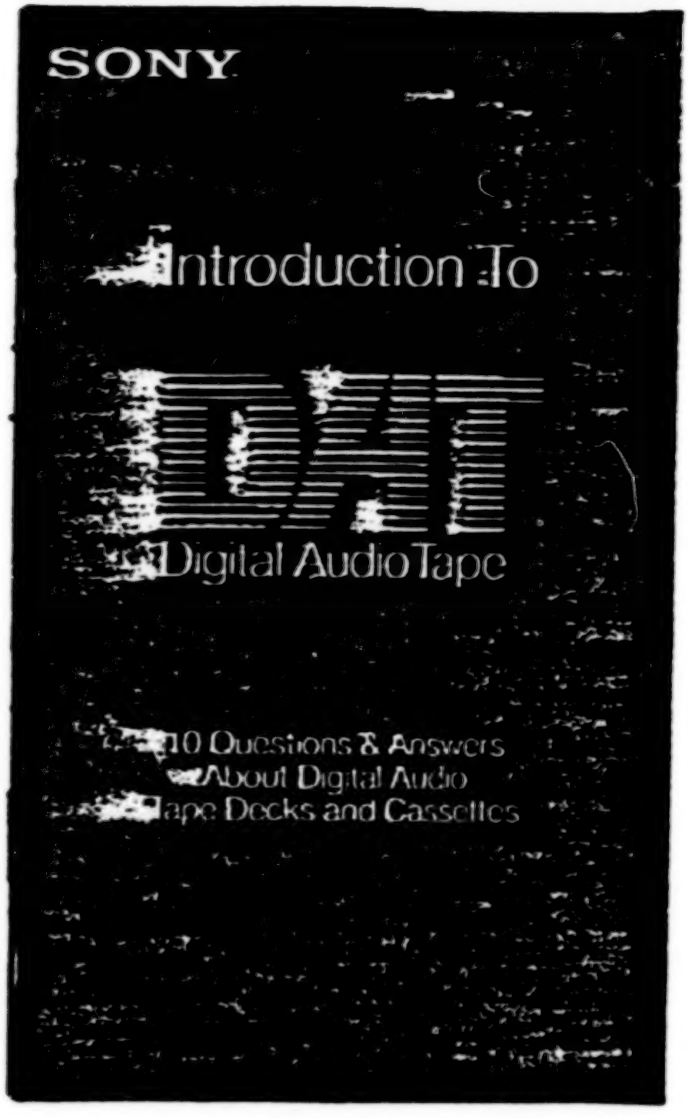

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1. I've heard a lot about a new type of digital audio tape cassette. Does it sound as good as a Compact Disc?
Digital Audio Tape (or DAT for short) is an entirely new tape format which is about 2/3 the size of a standard compact cassette. And since it's digital, it sounds better than any type of analog cassette you can currently buy. In fact, DAT has the same dynamic range and incredible sound reproduction as a Compact Disc.

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2. Explain to me, in simple language —why is DAT better than conventional cassettes?
Because it's digital. Unlike analog systems which have inherent limitations for reproducing music, the DAT system converts the original recording into a series of numbers (0's and 1's) called "bits". The system processes nearly

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3 million bits of digital data each second. The entire tape can hold literally billions of pieces of data. It is these numbers which allow for the unprecedented accuracy of DAT. And, because the music is stored as a series of 0's and 1's, each time the tape is played back the music sounds just the way it was originally recorded.

The DAT system allows for up to two hours of recording and contains codes for the beginning and end of each song, as well as time codes so that you can easily find any selection on the tape.

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3. But don't digital audio tapes have the typical problems of cassettes, like "wow and flutter" or speed variations?
No. With DAT, those types of speed variations that affect conventional cassettes are so low they can't even be measured. And DAT's distortion is less than 1/100 the distortion of a conventional analog cassette.

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4. Do Digital Audio Tape cassettes have any other advantages over conventional music cassettes?
Yes. Because DAT decks utilize a special miniature rotary record/playback head similar in design to video cassette recorders, they offer much faster music access time, with less wear on the tape itself. And, as an added bonus, the rotary head drum ensures the utmost in tape stability, for superior resistance to shock and vibration.

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5. But I already own a CD player—do I need a DAT recorder?

Yes, for example, if you'd like to create custom music compilations of your favorite CD selections, or if you'd enjoy a durable, easy-to-handle tape format with CD sound quality that's ideal for both car stereo and portable audio applications, or if you'd enjoy digital prerecorded tape titles, dozens of which already exist with more to become available in the future ... then DAT is for you.

6. Is it true that DAT recorders incorporate a new technology that even allows you to record digital data directly from a Compact Disc player?

That's correct. All of the new DAT home, and portable models incorporate the Serial Copy Management System (SCMS), which allows you to make a digital cassette copy directly from a Compact Disc (although with such copies, SCMS prohibits a second digital copy from being made).

With SCMS, you can also make a digital copy from an analog source, then produce a second generation copy direct-to-digital. But you cannot make a third generation "digital" copy from the second generation tape.

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7. OK, suppose I'm interested. I already own lots of good stereo equipment— what do I do with it all?
Keep it, of course. Providing you have a good system to start with, a DAT deck is fully compatible with all of your present hifi components. Simply plug into the "TAPE" or "AUXILIARY" inputs of your receiver or amplifier. Once you connect the equipment, you're ready to play or record. For the ultimate level of fidelity, you can even connect a "digital" input via an optical cable to a Sony DAT player. (Providing, of course, that your hifi has "digital" outputs.)

8. Will all DAT recorders produce the same excellent sound?
Frankly, no. Because like all audio products, DAT sound quality is greatly dependent on each company's manufacturing experience, technology and component quality. As well as the individual recording expertise of each music enthusiast.

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9. DAT sounds great. But is it better than Compact Disc?

Since CD and DAT utilize the same digital technology, they sound nearly identical. DAT is slightly more resistant to shock and vibration than Compact Disc, making it ideal for home, auto, and portable use. CD has an advantage because it's played by a laser, so there's no physical contact. Optical reading also means quicker access to specific tracks.

10. So DAT won't replace Compact Disc?

Absolutely not. Both DAT and CD will coexist, just as cassettes and LPs coexisted for a number of years. And as Compact Disc has become the new standard in disc performance, we envision DAT becoming the reference standard for high fidelity recording in the future.

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GENERAL COUNSEL
OF COPYRIGHT
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Before the
Copyright Office
Library of Congress

Comment Letter
RM 90-6
No. 21

In the matter of	)	
	)	
Notice of Inquiry Re.	)	Dkt. No. RM 90-6
Digital Audio Broadcast and	)	
Cable Services Copyright Office	)	
Study	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB"),[1/] hereby submits its Reply Comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

At the outset, NAB must raise strenuous objection to the attempts by the Recording Industry Association of America ("RIAA") to manipulate this proceeding by asking parties to comment on, and asking the Copyright Office to consider, its request for a recommendation favoring a performance right in all sound recordings. Consideration of RIAA's request in this proceeding clearly would exceed the scope of the Notice of Inquiry ("NOI"). The expressed intent of the NOI is to consider possible adverse effects that implementation of digital audio broadcast and cable services might have on performers and copyright owners, and possible remedial measures to consider if such ill effects currently can be anticipated. By no stretch of the imagination can the NOI be deemed to

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1/ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

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have alerted parties to the possibility that the Copyright Office would, in this proceeding, revisit the issue of whether the United States should recognize a performance right in sound recordings. While the Copyright Office is, of course, free to reconsider this issue, to do so under the guise of this proceeding would be patently unfair and would raise grave due process concerns. Accordingly, the Copyright Office should decline even to consider RIAA's performance right in sound recordings proposal as part of this proceeding.

If, despite its obvious procedural and due process flaws, the Copyright Office nevertheless sees fit to consider, in this proceeding, RIAA's request to recommend establishing public performance rights in sound recordings, it should reject such a proposal on the merits. The primary reasons for doing so are set forth in the attached work of Peter Jaszi,[2/] a professor at the American University's Washington College of Law, and a recognized expert in copyright law.

First, as Professor Jaszi explains, Congress' continuing refusal to provide a performance right in sound recordings has not, as RIAA claims, been some sort of anomaly or historical accident but rather "reflects a balance struck over time, and confirmed in the Copyright Act of 1976, between the various competing interests which have a stake in the operation of the copyright system -- including the ultimate interests of the consuming public."[3/] RIAA has provided nothing substantively new in the way of argument or facts not previously

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2/ Jaszi, Peter, "The Case Against Performance Rights In Sound Recordings," attached hereto as Appendix A (hereafter "Jaszi").

3/ Jaszi at 1.

considered by Congress which would warrant revisiting the equities of that balance.

Second, in advocating the imposition of new copyright and other restrictions on the broadcasting of prerecorded material, RIAA should bear a heavy burden of justification, which cannot be discharged by RIAA's mere bald assertions that sound recordings are entitled to "equal treatment" with other copyrighted works as a matter of natural justice. As Professor Jaszi explains, there are substantial policy justifications why "in the republic of copyright, not all works are created equal."[4/]

Third, RIAA's attempt to justify the creation of a performance right in sound recordings in this country on the basis that such rights are included in the Copyright schemes of other countries is unavailing. For as Professor Jaszi points out: "Not only are such systems animated by assumptions different from those which underlie American copyright, but each national system's treatment of sound recordings represents a 'balancing act' in its own right. We cannot borrow an isolated feature of such a system while ignoring the context in which it is embedded."[5/]

Fourth, RIAA's plea on behalf of allegedly undercompensated artists and musicians to legitimize its claim for a performance right in sound recordings completely ignores the extraordinary benefits these groups enjoy as a result of the massive free exposure which the broadcast industry provides them. If, in fact,

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4/ Jaszi at 3.

5/ Id.

these groups are undercompensated they should look to RIAA's members who collected some $8 billion in revenues last year, rather than to the broadcasting industry which is already paying hundreds of millions of dollars in copyright fees to play prerecorded music.

Returning to the realm of that which is encompassed within the scope of this proceeding, RIAA also seeks from the Copyright Office recommendations for legislation that would limit to one the number of cuts that could be played from a given sounding recording or by a given artist by a digital audio broadcaster within a given period, and which would require such broadcasters to transmit all digital subcodes contained in prerecorded digital recordings. NAB submits that RIAA has failed totally to establish the need or provide the factual basis for such drastic measures,[6/] and suggests that they would be of dubious constitutional validity. Moreover, RIAA's digital subcode requirement is both unnecessary and would be spectrum inefficient.

II. RIAA'S PERFORMANCE IN SOUND RECORDINGS PROPOSAL SHOULD BE REJECTED FOR REASONS BOTH PROCEDURAL AND SUBSTANTIVE

A. Procedural Objections To Considering RIAA's Performance Right Proposal In This Proceeding.

In Senator Dennis DeConcini's July 25, 1990 letter to the Copyright Office, he requested that a study be conducted "to determine how the rights of copyright owners of sound recordings and performers are protected with respect

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6/ NAB's Reply Comments will also discuss why the Roper Survey attached to the Comments of the Copyright Coalition fails to provide an adequate basis for such measures.

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to digital audio transmissions" (emphasis supplied), and sought recommendations for additional means that might be necessary to protect the rights of copyright owners with respect to such digital transmissions.

The Copyright Office's NOI issued in response to Senator DeConcini's request expressed concern over "the rights and interests of those who own copyrights in works that may easily be transmitted and then copied in digital form," and noted that such concern "bring[s] to light often-aired debates about home taping."[7/] Commenting parties were asked to include "descriptions of methods for compensating copyright owners for copying of near-perfect reproductions of their works . . . and royalties on public access to new digital audio transmission services."[8/] Specific questions numbered (1) and (2) in the NOI solicited comment on the likely impact of DAB on the taping habits of listeners and how such taping might displace sales of copyrighted works. Question (4) asked whether a royalty should be placed on "recording materials . . . or on digital recording equipment itself" while Question (5) sought views on whether digital audio broadcasters should be required to scramble their signals to reduce the incidents of home taping.[9/]

The Copyright Office is, of course, bound by the Administrative Procedure Act.[10/] Applying the APA's requirements of adequacy of notice and

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7/ NOI, 55 F. Reg. 42916 (October 24, 1990) at 42917 (emphasis supplied).

8/ Id.

9/ Id.

10/ 7 U.S.C. § 701(d).

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fair opportunity for public comment regarding whether to consider RIAA's performance right in sound recordings proposal in this proceeding, the APA requires that "an agency give advance warning of proposed informal rulemaking by publishing in the Federal Register a notice containing 'either the terms or substance of the proposed rule or a description of the subjects and issues involved'." Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980). As the Court in Spartan observed "[t]his notice requirement encourages participation in the proceeding and helps ensure informed agency decision-making." Id. Absent such notice, "unfairness results unless persons are, 'sufficiently alerted to likely alternatives' so that they know whether their interests are 'at stake'." Id.

By no stretch of the imagination can the NOI be deemed to have alerted all potentially affected parties to the possibility that the Copyright Office, in this proceeding, might consider recommending to Congress RIAA's proposal that the copyright laws be amended to recognize a performance right in all sound recordings.[11/] The Copyright Office should find it particularly unseemly that RIAA would attempt to obtain such a sweeping recommendation in a proceeding where no notice was provided that such a proposal might be considered, while at

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11/ RIAA all but concedes this point by introducing its performance right proposal with the admission that "the [home taping] implications of these new [digital] services are partially, but not entirely, as the Copyright Office's Notice of Inquiry suggests." RIAA Comments at 3. Examples of groups which may have no idea that their interests could be adversely affected by the consideration RIAA's proposal include jukebox interests, dance clubs, restaurants and other commercial establishments where prerecorded music is played.

the same time attempting to justify the proposal in the name of "fairness." NAB respectfully submits that a Copyright Office recommendation emanating from this proceeding of the sort sought by RIAA would be a patent denial of due process.

B. RIAA's Performance Right Proposal Lacks Merit.

Should the Copyright Office see fit to consider RIAA's performance right proposal in this proceeding notwithstanding the obvious procedural flaws inherent in doing so, NAB submits that it should be rejected, especially as applied to free over the air broadcasters, for RIAA's failure to meet the heavy burden required of those seeking to extend a copyright monopoly into an area long considered part of the public domain.

In evaluating RIAA's proposal, it is important, at the outset to distinguish, as RIAA disingenuously fails to do,[12] between, on the one hand, digital services which "inten[d] to charge subscribers directly for listening to [RIAA's] product,"[13] or "pay-per-listen services, which, like current cable television pay-per-view services, will enable listeners to obtain a direct time-certain transmission of an album of their choice,"[14] or a "celestial jukebox" type services "which enable consumers to select music to listen to at their convenience and even download it as part of their permanent collection,"[15] and on the other hand, potential terrestrial digital audio broadcasters providing a traditional free over-

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12/ See e.g. RIAA Comments at 4, 6, 8-11.

13/ RIAA Comments at 4; see also pp. 6-8, 11.

14/ Id.

15/ Id.

the-air commercial broadcast service. For while there may be some justification for having record companies compensated by digital audio services which, in effect, compete with record sales by offering a commercial-free paid service to subscribers and which facilitate and/or encourage wholesale taping of albums; that does not justify creating a scheme which would indiscriminately also allow record companies to extract royalties from both digital and analog broadcasters: 1) whose advertiser supported service is not likely to be taped and 2) whose service stimulates rather diminishes the sale of sound recordings.

In assessing RIAA's performance right proposal as it would apply to free over-the-air broadcasters, RIAA bears the burden of showing that its proposal:

1) can fit harmoniously within the existing legal framework without violating existing principles or basic concepts;

2) is capable of a reasonably clear and satisfactory definition;

3) has presented an honest analysis of all the costs and benefits of the proposed legislation; and

4) will enrich or enhance the aggregate public domain.[16/]

RIAA has clearly failed to meet this burden.

One justification provided by RIAA in its quest for a performance right in sound recordings is that the absence of such right in U.S. copyright law is an anomaly or some sort of historical accident. As Professor Jaszi painstakingly

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16/ As Professor Jaszi explains, this four part test was adopted by Congressman Kastenmeier during consideration of the Semiconductor Chip Protection Act of 1984 as the standard against which proposed new extensions of copyright monopoly into the public domain should be judged. Greater detail of each of these tests is provided in Professor Jaszi's work at pp. 13-15.

documents,[17/] this simply is not true. Congress has, on numerous occasions, been exposed to virtually all of the arguments raised in RIAA's Comments; has solicited and considered the views of the Copyright Office recommending enactment of a performance right in sound recordings; has weighed the merits of those arguments and recommendations against the legitimate countervailing interests and needs of both institutional users of sound recordings, such as broadcasters, and the consuming public; and, on balance, has determined that the greater public good is best served by not providing performance rights in sound recordings.

Professor Jaszi also effectively debunks RIAA's notion that the absence of performance right for sound recordings is an "intellectually indefensible gap in the Copyright law"[18/] and that sound recordings should be afforded such rights in the name of "fairness" just because other categories of copyrighted works enjoy performance rights.[19/] Specifically, Professor Jaszi points out that any number of categories of copyrightable subject matter, such as commercial designs, functionally organized directories, architectural works, and computer programs, enjoy greater or lesser degrees of protection which are justified by "the peculiarities of how the many different kinds of works which make up the contemporary universe of copyrightable subject matter are made and

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17/ Jaszi at pp. 4-11.

18/ RIAA Comments at 12.

19/ Jaszi at 15-20.

used."[20/] The "idea/expression" distinction, the "useful article" doctrine, the requirement of "substantial similarity," and the "fair use" doctrine represent additional limits which the copyright laws have placed on the exercise of proprietary rights.

Responding to RIAA's claim that performance rights in sound recordings should be adopted in the United States because such rights are provided in other countries, Professor Jaszi correctly observes that, "to compare one feature of American law with one feature of analogous foreign law without taking into account how each feature figures into the entire legal scheme of the respective country can produce exceedingly misleading results."[21/] For example, some of the same countries cited by RIAA as providing royalties in connection with the public performance in sound recordings, also are far less generous than is the United States in the number of years that protection is afforded to sound recordings.[22/]

In its discussion about the international implications of the lack of a U.S. performance right in sound recordings, RIAA first suggests that this country

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20/ Id. at 18. Nor is the United States the only country that makes such distinctions between various subject matter for which some measure of intellectual property protection is provided. As RIAA itself points out, many other countries either provide no performance right for sound recordings or provide "lower levels" of protection. See RIAA Comments at 16-18.

21/ Id. at 22.

22/ Jaszi at 22-23. In this regard, it would be interesting to know if, for example, RIAA would trade its 75 to 100 year protection in sound recordings and no performance right in sound recordings for Germany's 25 years protection in sound recordings. Id.

should adopt such a right because so many other countries have done so,[23/] and then argues that such a right should be adopted because the World Intellectual Property Organization's ("WIPO") model copyright law, the Berne Convention, and so many other countries have not done so, but surely would if only this country would recognize the right.[24/] The response to RIAA's first argument is that "[t]hose who allege that more than 40 countries protect sound recordings by copyright forget that copyright is used in different meanings in different countries," and "it is doubtful that there is real copyright protection in the sense in which this protection exists in the Berne Convention even in the 12 countries to which reference has been made . . ."[25/]

With respect to RIAA's second argument, while RIAA's assertion that the copyright policies of so many sovereign nations and multi-lateral intellectual property agreements are totally dependent on U.S. copyright policies is certainly flattering, it ignores the possibility that after due deliberation of the countervailing interests and values at stake, these countries may have independently come to the same conclusion that Congress has, namely that different treatment should be afforded to sound recordings. Moreover, as Professor Jaszi points out, what WIPO's failure to accord protection to sound recordings demonstrates "is not that the United States is out of line with an

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23/ RIAA Comments at 16.

24/ Id. at 18.

25/ WIPO Meetings: Committee of Experts on Model Provisions for Legislation in the Field of Copyright -- Third Session," Copyright, September 1990, at 241, 262.

emerging international consensus, [r]ather it demonstrates that no consensus exists."[26/]

RIAA's attempt to legitimize its claim for a performance right in sound recordings by making a plea on behalf of undercompensated artists and musicians rings particularly hollow for several reasons.

First, it is the free airplay by broadcasters that provides featured artists with both the initial mass exposure to audiences necessary to establish themselves, and which then provides the continuing link with those audiences necessary to move them up the ranks to fame and fortune.[27/] The benefits of this mass exposure manifests itself not only in the form of sales of sound recordings, but also in revenue generating activities such as concerts and music video sales as well. As noted by the Office of Technology Assessment's recent home copying study:

> Artists receive no royalties on recordings given to radio station or record stores for promotion. Recording companies believe that these free promotional albums expose the recording to a wider audience, which may then purchase its own copies.[28/]

26/ Jaszi at 24.

27/ The 1984 Office of Technology study cited at length in NAB's Comments in this proceeding found that 79% of those who purchased prerecorded music of particular recording artists in the last year already had heard the performer or specific musical recording played either on radio or television. OTA Study, Table 8-11.

28/ OTA study at p. 106.

Simply stated, without the massive free exposure and publicity provided by the broadcast industry, many of the artists and musicians who RIAA claims are undercompensated might be driving cabs.

Second, RIAA's assertion that, "[p]erformance royalties from the countless broadcasts of these recordings would provide deserved and needed income to such artists and musicians,"[29] is anything but preordained.[30] Attached as Appendix B is an excerpt from a statement filed by the Audio Recording Rights Coalition in 1985 Senate Hearing on the Home Audio Recording Act[31] in which it describes, in graphic detail, the reasons why the extraordinary leverage and bargaining power of the relatively few monolithic recording companies make it extremely unlikely that any added revenues in the form of performance royalties from sound recordings would ever find their way into the pockets of any but the most wealthy and successful artists. The statement cites, as an example, an artist who, after three years in the business, two albums and several major tours, earned less than $150,000 out of total retail gross record sales exceeding $10 million. If RIAA is genuinely concerned about the plight of new and lesser known artists and studio musicians, it should start by reviewing the fairness and

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29/ RIAA Comments at 15.

30/ While the American Federation of Musicians et al. have filed comments in support of RIAA's performance right proposal, it is interesting to note this organization's historical vacillation on the issue. See Jaszi at 4-5.

31/ Hearings Before the Subcom. on Patents, Copyrights and Trademarks on the Home Audio Recording Act (S. 1739), 99th Cong. 1st & 2nd Sess. (1985).

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equity of the revenue sharing and other contractual provisions its members foist on these groups.[32/]

Two ancillary issues raised by RIAA on the undercompensated artist issue are: 1) the situation where an artist records a "classic" which enjoys airplay for years after its initial release; and 2) instances where a song recorded by one artist enjoys only modest success and is then rerecorded by another artists which becomes a hit.[33/] With respect to RIAA's first example, it is broadcasters, and particularly stations with formats like "classic rock" that provide continued free exposure to new generations of listeners and record buyers which, in turn, perpetuate record sales even after the artists are no longer recording and/or publicly performing.[34/] Moreover, stations generate significant additional sales of the works of such artists in new formats such as CDs and DAT recordings which

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32/ See e.g., OTA Study at 98: "These provisions may be contingent on the relative bargaining power of the recording artist - i.e., whether he is a new or well-established artist."; OTA Study at 95: "Sales from a few new talents may represent large profits for record companies, since new artists rarely receive the high royalty rates of well-established artists."; OTA Study at 107, recounting how some record companies pay the same royalties for CDs and LPs regardless of the difference in price. There have also been exposes in recent years of how, in the early years of recording rock and roll and rhythm and blues, record companies entered into unconscionable recording contracts with naive and unsophisticated artists which yielded millions of dollars of profits for the record companies over the years while leaving the artists penniless.

33/ RIAA Comments at 13-15.

34/ For example, RIAA concedes that record (and presumably cassette and CD) sales of "White Christmas" continue each December resulting from its extensive airplay. Id. at p. 14 n. 9. The continued sales enjoyed by "golden oldies" is further evidenced by the numerous advertisements for these collections, and by the fact that large stocks of them continue to be carried by record stores. Moreover, groups such as the Four Tops and the Four Seasons are able to continue to perform publicly before all age groups as a result of the continued airing of their works by broadcasters.

generate far greater profit margins than the vinyl recordings or tapes on which they were originally released.[35/] Turning to RIAA's second example, assuming royalties were required to be paid for the performance of sound recordings, it is unclear by what logic the royalties paid to an artist whose recording of a work enjoyed only modest success should be enhanced by the fact that another artist's recording of that work was a hit.[36/]

As the foregoing discussion demonstrates, RIAA has failed to meet any of the requirements to which its performance right proposal should be subjected. It has failed to show how its proposal would fit within the existing copyright framework without violating existing principles and basic concepts. It has not provided a reasonably clear and satisfactory definition either of the scope of the right it is proposing or how the royalty scheme that would flow from its proposal would work. It has failed to present an honest analysis of all the costs

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35/ See OTA Study at 107: "With higher profit margins than records or tapes, CDs have become the most profitable format for [record] companies: a CD that may have cost $5 to $6 to produce and distribute will sell for $10 or more.

36/ This argument by RIAA raises the specter that were a performance right in sound recordings recognized, RIAA would attempt to foist on broadcasters the inequitable music licensing scheme under which they have been operating for years whereby a station is required to obtain a license for all works in a music licensing organization's repertoire regardless of how infrequently most works are broadcast.

and benefits of its proposal,[37] and it has failed to demonstrate how its proposal will enrich or enhance the aggregate public domain.

III. RIAA HAS PROVIDED NO BASIS TO SUPPORT ITS ANTI-CONSUMER PROPOSALS TO RESTRICT THE NUMBER OF ALBUM CUTS THAT DAB BROADCASTERS COULD PLAY SEQUENTIALLY AND TO REQUIRE RETRANSMISSION OF DIGITAL SUBCODE INFORMATION

RIAA's Comments request that the Copyright Office recommend legislation to: 1) prohibit digital audio broadcasters from transmitting more than

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37/ In evaluating the legitimacy of its performance right proposal RIAA boldly asserts that neither it, nor copyright policy makers, need consider the benefits it would bestow on RIAA members or the burdens that would be incurred by groups such as broadcasters. (RIAA Comments at 9). This position apparently arises out of RIAA's theory that a performance right in sound recordings should be created under a "natural law" approach to copyright based on RIAA's notions of fairness. As Professor Jaszi points out, (Jaszi at 16-20), copyright law admits of no such theory. It is not based on any natural law notion of property rights, but instead on a legislative balance of interests in intellectual property between creators and users, intended to facilitate maximum use of creative endeavors while encouraging further creative works. Since it is the copyright law itself that creates any right in sound recordings, it is entirely circular to argue that abstract notions of equity require that a performance right be recognized in copyright law.

Instead, parties who wish to change copyright law bear the burden of demonstrating how the twin values which copyright protection seeks to enhance would be served by the proposed change. That analysis, of necessity, requires a balancing of the benefits which the new right would create and the burdens it would engender. Congressman Kastenmeier so recognized when he demanded that proponents of new copyright interests be required to:

> "candidly identify the groups that will bear the adverse consequences of the proposal and explain why they should bear those losses. The argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirement of the intellectual property clause . . . ."

Jaszi at 14 quoting Kastenmeier & Remington, "The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?" 70 Minn. L. Rev. 417, 440-442 (1985).

one cut from a sound recording or by a given artist during a specified time period without the consent of the copyright owner of the sound recording; and 2) require that digital audio broadcasters transmit all digital subcode information contained in prerecorded digital recordings. NAB opposes these proposals on the grounds that RIAA failed to demonstrate a need for such onerous regulations and that such regulations would be of dubious constitutional validity.

A. RIAA And Others Have Failed to Demonstrate the Need for RIAA's Proposed Onerous Regulations.

In Comments filed in the Federal Communications Commission's DAB proceedings,[38] in which RIAA seeks adoption of the same rules requested here, RIAA stated that its justification for such rules is that DAB has "the potential to destroy the sales market for sound recordings inasmuch as it permits the delivery of a competing product with comparable sound quality and at a lower cost."[39] Specifically, RIAA alleges that "a digital radio service could transmit an entire album of a popular artist . . . thereby making it available for perfect home copying . . . throughout the country."[40]

Unfortunately, RIAA has provided neither the Commission nor the Copyright Office with hard facts to support its speculation that, absent its proposed rules, home recording of advertiser supported digital audio broadcasts

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38/ Notice of Inquiry in Gen. Dkt. No. 90-357, 5 FCC Rcd. 5237 (1990).

39/ RIAA's FCC Comments at 2 (emphasis supplied).

40/ Id. at 4 (emphasis supplied). RIAA provides no empirical data on the extent to which over the air broadcasters engage in the practice of transmitting entire albums without commercial interruption.

will result in the imminent demise of the multi-billion dollar recording industry.[41/] To the contrary, the most current available data on home taping of prerecorded music off the air suggests that it is having little, if any, adverse impact on the recording industry and that any such impact is more than offset by the benefits obtained by the recording industry from the free exposure broadcasters provide for its products.

NAB's Comments in this proceeding cited findings in a 1989 study conducted by the Congressional Office of Technology Assessment,[42/] which revealed that: a) the vast majority of people who copy prerecorded music make copies from sources other than radio or television; b) the taping of music from radio and television broadcasts was almost exclusively non-albums, indeed, only five percent of those surveyed had taped an album off the air within the preceding 12 months; c) by far the most often cited reason for taping was "to permit the taper to shift a recording he owned to other playback equipment . . . so that they can play them in their car, Walkman, or elsewhere;" d) while home taping from all sources displaced some sales of prerecorded products, home taping was also found to have a stimulative effect on sales by helping to advertise songs and performers; e) playback technology rather than copying technology had driven home taping, hence DAB, which would enhance the quality of that which could be taped as opposed to enhancing the ability to play back, could not be

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41/ Billboard (March 24, 1990) 1, 73 ($6.46 billion in manufacturer's dollar value of sales at suggested list price during 1989).

42/ U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges The Law, OTA-CIT-422 (Washington, D.C., U.S. Govt. Printing Office, October 1989) ("OTA Study").

anticipated to increase home taping; and f) people make little discrimination in the grade of blank tape they use; indeed only about one-third of music tapers even know what grade of tape they use.[43/]

The OTA data -- indicating that only 27 percent of those surveyed taped music from radio, television and off cable,[44/] and that only five percent of those surveyed had taped an album off the air within the preceding '2 months -- provide a compelling justification not to impose the "one cut" limit or digital subcode requirement urged by RIAA. Moreover, RIAA's unfounded speculation that the availability of DAB will appreciably increase the incidents of off-the-air taping is strongly undercut by the fact that approximately 53 percent of all radio listening is not even done in the home,[45/] where most taping presumably would occur, and the fact that a major reason there is so little taping of prerecorded music off-the-air undoubtedly is because of the time, inconvenience and advance planning required to do so. Further, RIAA conveniently ignores the not inconsiderable anti-consumer implications of its "one cut" limitation proposal which would have the practical effect of reducing the listening enjoyment of the vast majority of television and radio listeners who do not engage in home taping.

The results of the Roper Survey data, submitted with the Comments of the Copyright Coalition, which purports to "prob[e] likely taping activity with DAT," does nothing to alter the conclusions that: taping of prerecorded music off

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43/ See NAB's Comments at 8-11.

44/ Id. at 9 n.10 (citing OTA study at 152, tables 5-9).

45/ See Radio Facts For Advertisers, 1990, Radio Advertising Bureau, Inc., New York, N.Y.

the air is having little adverse impact on the recording and music industries; any such impact is more than offset by the benefits obtained from the free exposure broadcasters provide for their products; and, accordingly, no new restrictions should be placed on digital audio broadcasters.

First, to place the importance and significance of the Roper Survey in this proceeding in the proper perspective, it "did not directly question consumers concerning projected copying behavior involving digital audio broadcasts or cable services."[46/]

Second, both the Roper Survey and the Copyright Coalition's Comments tend to obfuscate and make more draconian the survey's results by reporting percentages of subsets such as "current prerecorded music tapers" or "those interested in owning a DAT recorder" rather than percentages of the entire survey sample. For example, the Coalition's Comments assert that "66 percent of current home tapers copy music from AM and FM radio broadcasters"[47/] when, in fact, it is that percent of home prerecorded music tapers who are interested in DAT that tape off radio[48/] which, in turn, only represents about 10.8% of the total of those surveyed. Another example is the Coalitions Assertion that: "one-third of current music tapers said that they would tape more pre-recorded music if they had a DAT recorder available . . .,"[49/] which represents only 9.9% of the entire survey sample.

46/ Coalition Comments at 16 n.22.

47/ Coalition Comments at 15-16 [emphasis supplied].

48/ Roper Survey at 13.

49/ Coalition Comments at p. 14.

Third, of the 43% of the total sample indicating any interest in DAT recorders, only about three-quarters continue to be interested even at the lowest price level offered ($300-$500) in the survey. Thus, at most, one-third of the total population has any interest in DAT recorders even at a highly optimistic price level. CD players were introduced around 1982. The latest figures show that CD player penetration is around 22%. Hence, it is likely that less than 20% of the population will have DAT recorders in their homes by the end of the century.

Fourth, the Roper survey report defines "infringing behavior" as a taping of prerecorded music, (Survey at 3), without any explanation, legal or otherwise, for doing so.

Fifth, the Coalition's claim that DAT recorders would encourage not only current tapers but also current non-tapers to increase their incidence of "infringements,"[50/] is highly speculative. A proper reading of these results requires the following equation:

> Of those who are interested at all in DAT recorders who are also interested in paying at least $300 for such a recorder, who also plan to make recordings of prerecorded music, who also currently are tapers of prerecorded music [or not], who actually then buy a DAT recorder at some point in the next several years, will then increase their incidence of taping prerecorded music in a manner which infringes upon the legitimate copyright interests of the music creators, because of their perception of increased quality owing to the digital nature of the recording technology.

This suppositional string of circumstances with varying probabilities of actual occurrence at each stage to predict the future behavior of fickle consumers, when considered together with a notoriously tenuous link between

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50/ Coalition Comments at 14.

what consumers say they will do and what they actually do, is hardly the stuff upon which recommendations to make substantive changes in the Copyright laws should be based.

On the key issue of home taping off radio, the results of the Roper survey are that only 22.1% of the population engaged in this activity,[51/] which is even less than the 27% found to do so by the OTA survey.[52/] Significantly, the Roper survey sheds no light on critical aspects of this taping such as how often consumers made radio music tapes, how many tapings were made each time, the length and content of each tape, etc. To fill this crucial void, the Coalition's Comments cite to the OTA's estimate that 439 million music "tapings" occurring during the OTA survey period were made from radio or television broadcast sources. However, the Coalition conveniently omits OTA's important caveats that: 1) its survey data "supported a fairly broad range of estimated values, depending on the data items, and methods used;"[53/] and 2) the number of estimated "tapings" cannot be equated "to either the number of blank tapes used or the number of albums copied."[54/] In this regard, it is imperative to recall the OTA Survey finding that, "the tapings of music from radio and television

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51/ Only 37% of the general population acknowledged taping prerecorded music at all and of that 37%, only 55% taped from radio.

52/ OTA Survey Table 5-5.

53/ Id. at p. 154.

54/ Id. at 153.

broadcasts were almost exclusively non-albums"[55] and that only 5 percent of those surveyed by OTA had taped an album off the air.[56]

B. RIAA's "One Cut" Limitation Is of Dubious Constitutional Validity.

RIAA's proposed requirement that digital audio broadcasters be limited to playing one cut from an album or by a given artist within a specific time frame would seriously impact on those broadcasters' freedom of expression in creating interesting and entertaining program formats, thereby infringing on their First Amendment rights.[57]

RIAA's "one cut" proposal fails even the least restrictive constitutional test which has been applied in the regulatory context, that for "incidental restriction on First Amendment freedom" found in United States v. O'Brien.[58] In order to pass constitutional muster under O'Brien, governmental

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55/ Id. at 155.

56/ NAB Comments p. 9, n.12.

57/ Such a requirement would be entirely inconsistent with the FCC's longstanding efforts to move away from intrusive regulation of stations' programming decisions. As former Commissioner Robinson noted, "[q]uestions of pacing and style . . . all contribute to those fugitive values that radio people call a stations' 'sound' . . . . " Entertainment Formats (Notice of Inquiry), 57 F.C.C.2d 580, 595 (1976) (concurring statement of Commissioner Robinson). See, e.g., Unnecessary Broadcast Regulation, 57 R.R.2d 939 (P&F) (1985); Unnecessary Broadcast Regulation, 57 R.R.2d 913 (P&F) (1985); Deregulation of Radio, 84 F.C.C.2d 968, recon., 87 F.C.C.2d 797 (1981), aff'd in part and rev'd in part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); Entertainment Formats, 60 F.C.C.2d 858 (1976), recon., 66 F.C.C.2d 78 (1977), rev'd sub nom. WCNC Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979) (en banc) rev'd, 450 U.S. 582 (1981).

58/ 391 U.S. 367, 377 (1968). In citing the O'Brien test here, NAB is not taking the position that O'Brien is appropriate, but merely that RIAA's proposals do not meet even the limited O'Brien strictures.

regulations with First Amendment implications must "further an important or substantial governmental interest" which is "unrelated to the suppression of free expression," and the regulations must be "no greater than is essential to the furtherance of that interest."[58/]

In the rulemaking context, the requirement that an important or substantial governmental interest be shown translates "into a record that convincingly shows a problem to exist . . . ."[59/] RIAA has failed totally to show that, in fact, a problem exists. Rather its prayer for regulation rests solely on conjecture and speculation about the demise of a multi-billion dollar industry resulting from a proposed technology for which spectrum has not yet been allocated.[61/] This conclusion applies to RIAA's mandatory subcode transmission proposal as well, and that proposal thus suffers from the same constitutional infirmity as RIAA's "one cut" plank.

C. RIAA's Proposal to Require DAB Broadcasters to Transmit Digital Subcode Information Contained In Prerecorded Digital Recordings Is Unnecessary and Spectrum Inefficient.

In their Comments in this proceeding, both NAB and the Home Recording Rights Coalition ("HRRC") provided cogent and persuasive reasons

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59/ Id.

60/ Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

61/ Assuming arguendo, that there could be found the requisite governmental interest in protecting RIAA's members from uncompensated home taping of their product, RIAA still could not show that the proposal it has put forth is no greater than necessary to furtherance of that interest. Digital audio tape recorders can be programmed to limit taping, a method which would not interfere with the broadcaster's programming discretion.

why a requirement that digital audio broadcasters transmit all digital subcode information contained in digital sound recordings would be unwise, unnecessary,[62] and spectrum inefficient. NAB's Comments also explained why adoption of a copycode mechanism such as SCMS would be a preferable alternative.[63]

In its Comments, RIAA submits that its subcode requirement should be adopted to preserve Congress' options in the event it should choose to enact RIAA's performance royalty or other compensation schemes. This somewhat absurd and presumptuous suggestion places a cart before a nonexistent horse. As previously documented, Congress has repeatedly rejected such schemes and there is no indication whatsoever that it is seriously contemplating revisiting the issue in the near future. There is simply no merit to the suggestion that valuable spectrum should be wasted and that DAB broadcasters should be subjected to onerous requirements to convey RIAA members' commercial data on the off chance that Congress might someday pass legislation which such data might or might not assist in implementing.

The answer to RIAA's "most compelling reason for promulgating a digital subcode transmission rule," namely assuring that the public will be capable or receiving "useful" information such as the name of the selection, the artist, and the label on which it was recorded, is that the decision to provide such information should be left to the discretion of the broadcaster. Simply stated, if there is a marketplace demand for providing such information, the broadcaster

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62/ Comments of NAB at 16-17; Comments of HRRC at 53-55.

63/ NAB Comments at 17-18.

will provide it. If there is no such demand (and none has yet been demonstrated) broadcasters should not be required to transmit it.

IV. CONCLUSION

The Copyright Office's clear and unmistakable purposes in initiating the instant Notice of Inquiry were: 1) to investigate how the potentially enhanced sound quality to be provided by digital audio broadcasters and cablecasters might affect copyright interests if it results in an expansion of home taping, and; 2) assuming that a proliferation in home taping could reasonably be expected which would adversely affect such interests, to make appropriate recommendations to change the copyright laws.

In addressing the comments which discussed the issues raised in the NOI, NAB has demonstrated that: 1) any present attempts to make recommendations or to consider amending the copyright laws in any way relating to the works of copyright owners digitally transmitted by terrestrial over the air broadcasters would be precipitous and premature; 2) requirements that digital audio broadcasters include digital subcode information in their transmissions, or be limited in the selections they play from a given sound recording or artist are unnecessary, unjustified and are of questionable constitutional validity; and 3) assuming a home taping problem results from the initiation of DAB, the most focused and meaningful response would be the imposition of some type of copycode requirements.

As for other issues addressed in the Comments but not raised in the NOI, NAB has demonstrated that any consideration, in this proceeding, of proposals to adopt performance rights in all sound recordings would constitute a

flagrant violation of the Administrative Procedure Act and of due process and, in any event, that such proposals lack merit.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann
Exec. Vice President &
General Counsel

Benjamin F.P. Ivins
Assistant General Counsel

Jack Goodman
Special Counsel

Richard Ducey
Senior Vice President
NAB Research & Planning

Mark Fratrik
Vice President/Economist
NAB Research & Planning

Marcia De Sonne
Director of Technology Assessment
NAB Research & Planning

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APPENDIX A

THE CASE AGAINST PERFORMANCE RIGHTS IN SOUND RECORDINGS

by: Peter Jaszi*/
Professor of Law
Washington College of Law
The American University, Washington, D.C.

I. INTRODUCTION

DAB has the potential to improve the quality of the broadcast signals enjoyed without charge in millions of American homes. "Free broadcasting" long has functioned as one of the principal means by which prerecorded performances of musical (and to a lesser extent non-musical) works are disseminated to the public. It gives that public an opportunity to "preview" new music; it stimulates and renews interest in existing works; and it allows the public to make informed decisions about which recordings they will purchase. It also provides access for those members of the public who lack the means to purchase recordings for home use. Notably, even after "sound recordings" were afforded protection against unauthorized duplication under federal copyright laws, the performance of those recordings over the airwaves remained firmly entrenched in the "public domain." Seen in the light of the importance afforded to promoting the dissemination of protected works as a goal of copyright law, this result appears to be neither an accident nor a political compromise. Rather, it reflects a balance struck over time, and confirmed in the Copyright Act of 1976, among the various competing interests which have a stake in the operation of the copyright system -- including the ultimate interests of the consuming public.

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*/ A copy of Professor Jaszi's Resume is attached.

In effect, Congress' decades-long refusal to restrict broadcasting of sound recordings represents a choice -- a decision to promote certain fundamental copyright goals by particular means. While providing record producers with legal recourse against unauthorized, "piratical" interference with the orderly public dissemination of their recordings (and the musical works they incorporate) through sales, the Congress has itself resisted interfering in any way with the dissemination of recorded music by way of "free broadcasting." This result should be placed in the context of copyright history and policy. As Professor L. Ray Patterson has noted, the Anglo-American copyright system is rooted in the efforts of publishers to secure protection for their investment in the dissemination of texts:

> "To protect the right to exclusive distribution, publishers created copyright. From this protection the author who created the work gained at best a reward secondary to that of the publisher. Copyright, therefore, originally functioned to encourage not creation, but distribution. In this regard, copyright's function is essentially the same today."1/

Over time, copyright has come to protect authors' interests as well, and to function as an incentive to creativity in the public interest. But from its inception, copyright has served the public in another way -- by providing the legal preconditions for the widest possible dissemination of works of the imagination. One need not assert that the encouragement of dissemination is the only

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1/ "Free Speech, Copyright, and Fair Use," 40 Vanderbilt L. Rev. 1, 8 (1987)(citations omitted). Prof. Patterson's understanding of the origins of Anglo-American copyright is consistent with that of Professor Benjamin Kaplan in **An Unhurried View of Copyright** 8-9 (1967); in particular, it is borne out by the recent investigations of Professor John Feather, detailed in "The Book Trade in Politics: The Making of the Copyright Act of 1710," 8 Publishing History 18 (1980).

legitimate goal of a copyright system in order to rank it among the most important of such goals. Congress has chosen to legislate (and not to legislate) so as to maximize the dissemination of sound recordings (and the underlying works they embody) to the public. In terms of fundamental considerations of copyright policy, this choice was anything but an arbitrary or irrational one.

The benefits of DAB to the ultimate consumer are obvious, while any costs to copyright owners are speculative, at best. Those who would invoke the introduction of this technology to advocate the imposition of new copyright restrictions on the broadcasting of prerecorded material must bear a heavy burden of justification. That burden cannot be discharged by means of assertions that "sound recordings" are entitled to "equal" treatment with other copyrighted works, as a matter of natural justice. In the republic of copyright, not all works are created equal. Nor can the proponents of change make their case by pointing to the treatment of sound recordings in legal systems other than the United States. Not only are such systems animated by assumptions different from those which underlie American copyright, but each national system's treatment of sound recordings represents a "balancing act" in its own right: We cannot borrow an isolated feature of such a system while ignoring the context in which it is embedded.

In sum, more than legal rhetoric or references to non-analogous foreign laws should be required before new copyright interests are created in favor of the owners of sound recording copyright, and at the expense of the "public domain." Proponents of change must do more than show that they would

benefit from the imposition of new restrictions; they must demonstrate that those restrictions would not unnecessarily disrupt settled economic and cultural arrangements built on the foundation of vested expectations.

II. SOUND RECORDINGS IN PERSPECTIVE: STRIKING THE BALANCE

Long before rights in sound recordings received any legal recognition in federal law, there were those who advocated copyright restrictions on the broadcasting of prerecorded music, so as to provide record producers with a greater return on their investments.[2/] By contrast, other advocates of sound recording copyright soon urged such restrictions in the interest of providing additional compensation to musical performers.[3/] As the issue of copyright

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2/ Although the first efforts to amend the copyright laws to provide protection for sound recordings date from the 1920's, the campaign did not acquire much momentum until the early 30's, see B. Ringer, "The Unauthorized Duplication of Sound Recordings," Study No. 26 in Copyright Law Revision, Studies Prepared for the Committee on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, U.S. Senate, 86th Cong., 2nd Sess. (Comm. Print 1961) [hereinafter "Ringer Study"] at 21-37. See also **General Revision of the Copyright Law: Hearings Before the House Comm. on Patents, Trademarks and Copyrights,** 72d Cong, 1st Sess. 19 (1932); and see generally Diamond, "Sound Recordings and Copyright Revision," 53 Iowa L. Rev. 839 (1968) [hereinafter "Diamond"].

3/ Advocacy of behalf of performers began as early as 1936, in connection with a proposed General Revision of the Copyright Act. See Ringer Study at 29. But it should be noted that conferring new rights on sound recording copyright owners would do little, in itself, to benefit musicians. Although it may be argued that performers as well as producers contribute relevant "authorship" to sound recordings, see House Judiciary Comm., **Copyright Law Revision, Report to Accompany S.22** (No. 94-1476), 94th Cong., 2d Sess. (1976) at 56, the "work for hire" doctrine operates to constitute recording companies as the "authors" of those recordings, as a matter of law. As one commentator has observed, the "principal impact of [existing law] is that record companies, unlike songwriters, cannot collect royalties from radio and television stations for the broadcast of sound recordings," Olson, "The Iron Law of Consensus," 36 J. of the Copyright Soc'y of the U.S.A. 109, 126 (1988) [hereinafter "Olson"]; just so, the principal impact of a change in law would be to

(continued...)

protection for sound recordings matured, it became apparent that it would be difficult (to put it mildly) to generate consensus around it. Not only were additional interest groups heard from, but representatives of other groups revised their initial positions.

One student of the subject has summarized the history of the issue in Congress through 1951 as follows:

> Before the impact of radio broadcasting was really felt, these [proposals] attracted very little attention. As the importance of radio in the music publishing and recording industries grew, there was a proportionate increase in the pressure to secure copyright in sound recordings, and in the concerted opposition to such proposals on the part of author and user groups. The performers and manufacturers each sought protections for themselves and opposed it for the others. The author-publisher groups claimed that the proposals would unfairly discriminate against them, and the broadcasting and jukebox interests were strongly opposed to additional payments and licenses. The motion picture interests were favorably inclined toward limited protection for recorded performances. The AFM [American Federation of Musicians] backed away from its original support of the proposals, and later expressed no opinion on the question.[4]

3/ (...continued)
benefit those same companies. It has been proposed that recording companies could be directed by statute to share royalty income realized from performance rights with performers, see, e.g., Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 2d Session, **Performance Rights in Sound Recordings** (Comm. Print 1978) [hereinafter "1978 Report"] at 1069 (Addendum to the Report of the Register of Copyrights on Performance Rights in Sound Recordings, Draft Bill §7(c)(14), discussed in D'Onofrio, "In Support of Performance Rights in Sound Recordings," 29 U.C.L.A. L. Rev. 168, 192 (1981). But it is difficult to see how any legislation could guarantee that performers' gains from new income sources would not be offset, or even eliminated, by changes in recording industry contracting practices.

4/ Ringer Study at 37. The opposition of musical authors and publishers to the extension of protection for sound recordings, and in particular to the articulation of a performance right in such recordings, was based on a concern that, as one commentator has put it, "any performance fees paid for the use of sound recordings (continued...)

Thus, the particular balance struck with respect to sound recording copyright in the general revision of the copyright laws which led up to (and away from) the Copyright Act of 1976 must be understood against this background of dissension and confusion.

Although a measure of agreement emerged early in the revision process on the desirability of providing record producers with copyright protection against the unauthorized duplication of their recordings,[5/] none emerged with respect to other issues. As the Register of Copyrights put it in his 1965 Supplementary Report:

> Representatives of record companies have argued that there are no valid reasons in principle for placing sound recordings in a different category from all other works, and the American Federation of Musicians has recently adopted a formal position opposing the 1965 bill because it would deny performers "a modicum of economic incentive and participation in the vast profits derived from the public performance of records...." On the other side, proposals to this effect are strenuously opposed not only by those users who would have to pay additional royalties, but also by the owners of copyright in musical compositions who would probably get a smaller slice of the pie.... Underlying these arguments is further concern that, since performers contribute substantially to the aggregate of sounds fixed in a sound recording, the recognition of a performing right could introduce new and unpredictable factors of bargaining with performers into an already crowded and complicated copyright structure.
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> Section 112(a) of the [proposed revision] bill would ... specifically exclude "any right of performance under section 106(a)(4).... We are

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4/ (...continued)
would compel a reduction in the fees they receive for the performance of musical works." Diamond at 867 (designating this the "pie theory.") The internal policy disputes which caused the AFM to cease, at one point early on, its lobbying on the issue are described in Countryman, "The Organized Musicians," 16 U. Chi. L. Rev. 229 (1949).

5/ See 1978 Report at 28.

> convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired.[6/]

In fact, not even the recording companies lobbied seriously for a public performance right in the 1965 House hearings on the new legislation,[7/] and its was not until 1967 that the issue was pressed in earnest,[8/] still to no avail. In 1971, the Congress avoided consideration of the broader issues of copyright for sound recordings in order to enact limited protection against their unauthorized duplication.[9/] The Copyright Act of 1976 carried forward this limited copyright for sound recordings, and §114(d) directed the United States Copyright Office to undertake a study of the legality and desirability of additional copyright protection for this new class of works. Completed in 1978,[10/] this study

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6/ **Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill,** 86th Cong., 1st Sess. (Comm. Print 1965) at 51-52.

7/ See Helfer, "Copyright Revision and the Unauthorized Duplication of Phonograph Records -- A New Statute and the Old Problems," 14 Bull. of the Copyright Soc'y of the U.S.A. 137, 167-68 (also detailing support for performance right by industry witness in individual capacity).

8/ See generally, **Hearings** on S. 597 Before Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st. Sess. (1967) and the account in **Diamond** at 866-67. Among the issues most hotly debated was the question of whether recording companies and artists already were compensated, in effect, by the free exposure which their records received as the result of airplay.

9/ See H.R. No. 92-487, 92d Cong., 1st Sess. (1971), reprinted in 2 **U.S. Code Cong. and Admin. News** 1566 (1971). The legislation was strongly influenced by the international negotiations toward the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, which was concluded later in 1971 and ratified by the United States in 1973.

10/ See generally, 1978 Report.

recommended the extension of performance rights to sound recordings, and was the subject of extensive hearings in the course of which many by-now familiar positions were restated.[11/] In any event, no new legislation on the subject was enacted. Nor has it been since.

A. Sound recording protection and copyright policy

If the legislative record just outlined were no more than a history of inattention and indecision, one might argue that the time for action on expanding copyright protection for sound recordings was at hand. In fact, however, the provisions of present law were the result of a well-developed and comprehensive legislative process. More generally, it is easy enough, after the fact, to see how particular features of the 1976 Copyright Act could be revised to the advantage of one interest group or another,[12/] or improved on from a technical standpoint. To do so, however, would be to ignore the fact that the content of the 1976 Act was the result of a process of negotiation and interest-balancing. In fact, neither arguments from self-interest nor arguments from expertise should be a sufficient basis to set aside significant legislative choices incorporated in the 1976 Act -- unless they are arguments of the most compelling and urgent kind.

11/ See, e.g., **Copyright Issues: Cable Television and Performance Rights, Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm.**, 96th Cong., 1st. Sess. (1979).

12/ It can be argued that Congress, in the 1976 Act, by calling for a Copyright Office study on the advisability of a performance right in sound recordings [See § 114(d)], left open the issue of whether such right should be recognized. However, Congress' subsequent refusal to adopt legislation of the sort recommended by the Copyright Office in 1978 can be fairly viewed as a decision not to upset the balance established by the 1976 Act.

The ultimate decisions about sound recording copyright described in the preceding section were made in the context of a systematic general revision of American copyright law. The revision process wove an intricate pattern of compromises among competing interest groups into the new copyright law, and we should move cautiously in attempting to disentangle any one strand from the resulting fabric.[13/] In particular, Congressional decisions about the scope of copyright protection must be understood as interdependently related to choices about how to define exceptions to the law's protective reach. Absent necessity, those choices should not be reconsidered outside of the special legislative context in which they were made. In general, the Congress approached copyright revision with a bias against change -- unless change could win the support of what one writer has called "all 'respectable' interest groups."[14/] Indeed, throughout the revision process the Congress consistently urged those interest groups to compromise their differences, and to present the agreed-upon results in the form

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13/ Litman, "Copyright, Compromise, and Legislative History," 72 Cornell L. Rev. 857, 896-903 (1987) [hereinafter "Litman I"] (arguing that piecemeal judicial interpretation of controversial provisions may have "fundamentally altered the delicate balance of compromises that run throughout the 1976 Act.") The same risk exists with respect to piecemeal legislative revisions of the copyright scheme.

14/ Olson at 111. He describes this bias against change in the absence of consensus as a disinclination to impose "one-sided losses on copyright interest groups," id. at 113. And it should be noted that this process of copyright revision by agreement and compromise was nothing new: Essentially the same approach had been employed in the deliberations leading up to the enactment of the Copyright Act of 1909. See Litman, "Copyright Legislation and Technological Change," 68 Oregon L. Rev. 275, 282-88 (1989) [hereinafter "Litman II"].

of legislative proposals.[15/] Where agreement could be achieved, through compromises accommodating the interests of copyright owners and copyright users, changes in copyright principles were the result.[16/] Where there was no agreement, as in the case of performance rights in sound recordings, there was no change. These negative choices, along with many affirmative ones, became part of the overall balance of interests which is represented by the Copyright Act of 1976. And in the case of performance rights in sound recordings, the decision not to provide such rights is one which should not be lightly reconsidered.

At one level, the Congressional exercise in interest balancing entailed accommodation of the competing claims of various institutional interest groups vying for relative advantage: literary authors, musical composers, motion picture producers, record companies, broadcasters, musicians, and so forth. At a higher level, however, the Congress was engaged in another kind of balancing: trading off the claims of the consuming public against those of private copyright proprietors. Perhaps because the consuming public was not systematically represented in the revision process,[17/] it must be said that the private proprietary

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15/ See generally, Litman I. In her review of the legislative history of the 1976 Act, Professor Litman is at pains to point out that it is not a history of "cloakroom deals." Rather, "[t]he negotiated bargains of the 1976 Act were struck not between legislators and lobbyists but among representatives of opposing interests precisely because Congress publicly and on the record demanded that they sit down and agree." Id. at 881.

16/ See Litman II at 320-21 (describing the evolution of a pattern of interdependent rights and exemptions).

17/ In general, to the extent the consuming public was represented at all it was by proxy: Representatives of educational institutions seeking limitations on the scope (continued...)

claims generally were preferred in the striking of the final balance: The replacement of the vague generalities of the Copyright Act of 1909 by the expansive specificity of the 1976 Act represented a collective victory for copyright proprietors.[18/] But, in certain other respects, the scheme of compromises which lay behind that enactment gave limited recognition to the conflicting interests of the consuming public. When the Congress decided against new legislation, as in the case of expanded protection for sound recordings, it effectively promoted the interest of the general consuming public in preserving ready, inexpensive access to copyrighted works. Absent some compelling new justification, we should not rush to revise the balance struck in Congress so as to provide greater proprietary rights at the expense of that public interest.

B. Preserving the public domain

Another way to put the same proposition is that the refusal to enact performance rights in sound recordings represents an explicit Congressional recognition of the "public domain," the enrichment of which constitutes a primary goal of our copyright system. Although it is conventional to regard the "public domain" as consisting of works which are, by virtue of their age or other

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17/ (...continued)
of exclusive rights spoke for those institutions, and indirectly articulated the interests of the pupils who are the ultimate consumers of educational materials; even so, in the debate over performance rights in sound recordings, the broadcasting industry spoke for itself, and indirectly for home listeners and viewers.

18/ This tendency may be seen, for example, in the expansion of the list of protected subject matter in §102 and the particularization of the exclusive rights of the copyright owner in §106. See Litman II at 320-22.

infirmities, entirely outside the scope of copyright protection, the concept is a far richer and more important one that such a description may imply. In fact, the "public domain" represents what one writer recently has termed "a commons that includes those aspects of copyrighted works which copyright does not protect..."[19/]

Thus, all the features of copyright law which impose limits on the exercise of proprietary rights (including the "idea/expression" distinction, the "useful articles" doctrine, the requirement of "substantial similarity," the "fair use" defense," and so forth) are themselves aspects of the "public domain"[20/] -- as is the traditional rule permitting broadcasting of sound recordings without the need to secure a public performance right in the recording. Although it curtailed the scope of the traditional "public domain" in many respects in the 1976 Copyright Act,[21/] Congress struck the balance with respect to rights in sound recordings in a manner which tended to preserve at least one important aspect of that traditional "public domain." For this reason, if for no other, proponents of expanded copyright protection for sound recordings should be required to produce

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19/ Litman, "The Public Domain," 39 Emory L.J. 965, 968 (1990).

20/ See Gorman, "Fact or Fancy? The Implications for Copyright," 29 J. of the Copyright Soc'y of the U.S.A. 560, 561 (1982): "[Limiting] doctrines mitigate the rigors of what might otherwise be an overreaching monopolistic control by the copyright owner, thus promoting society's interest in enriching the public domain."

21/ One notable example was the extension of the exclusive right of public performance in musical compositions and non-dramatic literary works. Under the 1909 Act, the right of public performance was extended to these works in cases of performance for profit (and this as to the latter only by virtue of an amendment enacted in 1952); the "for profit" limitation was eliminated in §106 of the 1976 Act. See generally, W. Patry, Latman's The Copyright Law 11, 218 (5th ed. 1979). For a prophetic vision of the protectionist tendencies of the 1976 Act, see B. Kaplan, An Unhurried View of Copyright 114 (1967).

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compelling justifications for their position.[22/]

III. PROPONENTS OF AMENDING U.S. COPYRIGHT LAW TO PROVIDE PERFORMANCE RIGHTS IN SOUND RECORDINGS BEAR A HEAVY BURDEN

The burden of persuasion to be met by advocates of legislative changes which would extend copyright monopoly into the "public domain" is discussed in an article co-authored by former Congressman Robert Kastenmeier; although the context of the discussion is the legislative history of the Semiconductor Chip Protection Act of 1984, the "political test" around which it centers is of general applicability:

> At the outset, the proponents of change should have the burden of showing that a meritorious public purpose is served by the proposed congressional action....
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> ...
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> The test is four-fold in scope. First, the proponent of a new interest ought to show that the interest can fit harmoniously within the existing legal framework without violating existing principles or basic concepts....
>
> Second, the proponent of a new intellectual property interest must be able to commit the new expression to a reasonably clear and satisfactory definition....

22/ In the 1971 House Hearings on sound recording copyright, Representative Kastenmeier put the proposition as follows:

> If we create a monopoly is this area, which is today legally free, -- and there is always a question when we act in this area -- we have to be able to justify it. There are justifications that may be raised, and objections may be raised by [consumer advocates] who are interested in effectuating the public interest. This committee must justify action on its part which has the apparent effect of extending monopoly.

Prohibiting Piracy of Sound Recordings, Hearings Before Subcomm. No. 3 of the House Judiciary Comm. on S. 646 and H.R. 6927, 92d Cong., 1st Sess. 20 (Comm. Print 1971) [hereinafter "1971 Hearings"].

> Third, the proponent should present an honest analysis of all the costs and benefits of the proposed legislation.... Since we live in a society of winners and losers, the proponent must also candidly identify the groups that will bear the adverse consequences of the proposal and explain why they should bear those losses. The argument that a particular interest group will make more money and therefore be more creative dos not satisfy this threshold standard or the constitutional requirement of the intellectual property clause [i.e. "to promote the progress of science and the useful arts."]
>
> Fourth, any advocate of a new protectable interest should show on the record how giving protection to that interest will enrich or enhance the aggregate public domain. The aggregate public domain benefit should outweigh the proprietary gains which result from protection. Congress can safely move forward if the cost to the public of the monopoly is deemed to be less than the value to the public of the total benefits caused by the law.[23/]

The test has its immediate genesis in an approach to evaluating proposed intellectual property legislation put forward by Professor David Lange at Congressional hearings in 1983.[24/] Specifically, Kastenmeier and Remington cite to the passage with which Professor Lange introduced his statement:

> [W]hat I propose is a kind of civil procedure for new copyright legislation -- a system imposing the legislative equivalent of burdens of proof and adverse presumptions to be met by anyone who proposes protection for a new interest.... [T]he new interest ought to

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23/ Kastenmeier and Remington, "The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?," 70 Minn. L. Rev. 417, 440-42 (1985) [hereinafter "SCPA Article"].

24/ See Copyright and Technological Change: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 98th Cong., 1st Sess. 60-66 (Comm. Print 1983)[hereinafter "1983 Hearings"]. Kastenmeier and Remington are at pains to point out the that "the Lange test has its predicates in other earlier works," including the discussion of the purposes of copyright in Professor Kaplan's An Unhurried View of Copyright 114-15 (1967), and going back to Lord Macaulay's noteworthy speech characterizing copyright as a "the least objectionable way" of assuring "a supply of good books." SCPA Article at 442 n.105.

> face a stiff challenge amounting to a heavy burden of proof and a clear presumption against recognition. Each new copyright interest, by definition, represents a potential encroachment on the public domain. No new interest ought ever to be recognized unless and until the consequences of that encroachment have been explored in the fullest practical sense. It is reasonable to require the proponent of a new interest to bear the burden of showing why any intrusion into the public domain ought to be allowed -- and equally reasonable to presume that the public domain will be protected until that burden has been discharged.[25/]

Later in his statement, Professor Lange expanded on the "cost-benefit" analysis required under the third step of the test he proposed (and Kastenmeier and Remington adopted):

> What may be at stake in a case like this are economic interests developed in reliance on a well-established concept amounting to a vested interest in the public domain. If so, it will not ordinarily be sufficient merely to say that the proposed legislation will extend the benefits of copyright to existing proprietors or make them more secure. To the contrary, unless a superior claim can be shown on some other ground, the interest derived from the public domain should prevail. Even dire warnings about the likelihood of industry-wide retrenchment should not lead automatically to changes in the copyright law. Copyright can be an efficient form of institutional bargain, but it is not intended to save buggy-whip manufacturers from ruin.[26/]

No less exacting a standard should be applied to efforts to justify encroachments on the public domain in the form of new limits on broadcasting of copyrighted sound recordings.

25/ 1983 Hearings at 65-66.

26/ Id. at 67.

A. Arguments purporting "equity" are insufficient to justify the extension of copyright in sound recordings

The burden of justification which must be borne by those who advocate the additions to the limited rights now enjoyed by the proprietors of sound records cannot be satisfied merely by pointing out that a perfectly symmetrical copyright scheme would afford the same exclusive rights to all copyright owners. Such an argument might have had a certain appeal when the subject matter of copyright was restricted largely to the "fine arts," as that term traditionally has been understood. Today, however, copyright protection extends to a variety of different kinds of works, including designs for toys and consumer products, factual compilations, and computer programs, which have little in common with its traditional subject matter, except insofar as perhaps all can be described as the "writings" of "authors" in a metaphorical sense. It is no longer tenable to argue that merely because all these kinds of works share the same general metaphorical description, all should receive precisely the same kind of protection.[27/]

I do not intend to revisit here the unprofitable question of whether sound recordings are in some sense Constitutional "writings," nor to rehash the

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27/ In fact, there is reason to think that the American recording industry may no longer place much stock in the rhetoric of equal treatment for all "works of authorship." RIAA's President last year claimed that "authors' rights are dead;" conceded that the recording industry's goal, at least in the international arena, is to obtain greater protection for manufacturers' rights; and stated that it "care[s] little about the banner under which [these] rights are protected . . ." Address to Library of Congress Seminar on "Intellectual Property: The American Experience," May 8, 1990.

issue of whether their production constitutes a form of "authorship."[28/] Rather, I wish to emphasize that the tendency in modern American copyright law has been toward legislative and judicial adaptation of general copyright principles to the peculiarities of how the many different kinds of works which make up the contemporary universe of copyrightable subject matter are made and used. Thus, for example, we restrict the effective scope of copyright protection in commercial designs by applying the so-called "useful articles" doctrine,[29/] and this Term the United States Supreme Court will decide (in Rural Telephone Service Co., Inc., v. Feist Publications, Inc.) what special principles should be applied in determining the extent of protection available to functionally organized directories.[30/] Recently, new legislation has been enacted to give copyright protection to "architectural works." But in recognition of the special character of such works, and uses made of them, the scope of exclusive rights with respect to an architectural work is limited to permit its unauthorized "pictorial representation,"

28/ See Meyers, "Copyright in Sound Recordings -- Another Milestone in the Protection of Intellectual Property," 19 Bull. of the Copyright Soc'y of the U.S.A. 184, 187 (1972).

29/ See, e.g., Keiselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980).

30/ See generally, Raskind, "The Continuing Process of Refining and Adapting Copyright Principles," 14 Columbia-VLA J. of Law & the Arts 125 (1990). Professor Raskind notes that "the appropriate conception of the authorship take account of the conduct involved in the production of each work, id. at 138, and proposes a special framework of analysis for cases involving maps and fact works.

and to allow the owner to alter or destroy a building embodying it.[31/]

Nor are the special adaptations of copyright doctrine to particular kinds of works always in the form of limitations on the scope of protection. Thus, for example, recent decisions have relieved plaintiffs in copyright cases involving computer programs of burdensome general restrictions on the proof of infringement.[32/] And special legislation has expanded the exclusive rights of sound recording copyright owners by restricting the operation of the "first sale" doctrine.[33/] In the light of these developments, it is unpersuasive, absent additional justification, simply to argue that sound recordings be accorded the same protection against public performance as other copyrighted works. Formalistic appeals to "fairness" or "equity" add little to a reasoned discussion of the issue.

This so-called "equitable" argument was the principal basis for the Copyright Office's 1978 Report recommending the enactment of performance rights in sound recordings -- on which Congress failed to act. In presenting the Report to Congress, Register of Copyrights Barbara Ringer explained the

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31/ These provisions were contained in Title VII of H.R. 5316, the Justice Improvements Act of 1990. See Daily Congressional Record (October 27, 1990) at H-13310.

32/ See, e.g., Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3d Cir. 1986), cert. denied, 107 S. Ct. 877 (1987) (authorizing expert testimony on the issue of "substantial similarity").

33/ Section 109(b) now reflects the provisions of the Record Rental Amendment of 1984. This year, similar restrictions have been imposed on "first sale" in favor of the owners of copyright in software programs. See Daily Congressional Record (October 27, 1990) at H-13310 and 13311.

"equitable" basis for the Report's conclusion:

> Mr. Chairman, I have taken a rather strong view that in principle I personally am, and also the Copyright Office under my leadership is, in favor of a royalty for the performance of sound recordings . . . I think I am committed to the principle of copyright and I think I am committed to the principle of protection for performance, the principle of creative workers, creators of original materials, being entitled to share under copyright principles in the remuneration that comes from the use of their works."[34/]

The difficulty with this argument is that it is circular. It is based on the fallacy identified by Felix Cohen in his seminal article, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 815 (1935): "The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value . . . depends on the extent to which it will be legally protected." The value which can be obtained from a copyrighted work is created by the copyright law; without the law, there is no legally protected interest.

Copyright owners certainly share in the proceeds of some remunerative uses of their works; the law which defines the extent to which they will share is not an equitable outgrowth of the common law, it is copyright. The Register's arguments in the 1978 Report and RIAA's present arguments for a particular extension of copyright protection are, therefore, arguments which assume -- rather than demonstrate -- the correctness of their distributable consequences.

34/ 1978 Report at 128.

Obviously, sound recordings, though valuable and worthwhile, are not paintings, nor phone books, nor computer programs. They are a particular class of works, with particular characteristics and associated with particular patterns of use. No one seems ready to contend that **all** limitations placed on the exclusive rights of copyright owners in §114 of the Copyright Act, including the restriction of the exercise of their §106(1) rights to cases involving duplication (rather than imitation) of sound recordings, now should be abolished as a matter of natural justice.[35/] It remains to be explained why, in particular, the limitation of those rights in favor of broadcasters, other users of sound recordings and their listeners now should be abrogated.

B. Advocates of Change In Performance Rights Must Explain Inadequacies of the Present System and Justify Dislocations That Will Flow From Change.

Advocates favoring creation of a performance right cannot simply rely on the increased financial remuneration that may flow to performers and record producers, but must also explain that inadequacy of the present system which provides these groups and the public with considerable benefits. The free dissemination of recorded works by broadcasters has obvious benefits to the public in permitting the widest reception of creative works. Moreover, there is reason to believe that, performers, and recording companies directly benefit from

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35/ See Chafee, "Reflections on the Law of Copyright: II," 45 Columbia L. Rev. 719, 736 (1945), explaining the policy basis for the limitations: "[W]e ought not to load courts with the new delicate task of comparing the methods of rival conductors."

the massive free exposure of their works by means of increased sales of records.[36]

The Register's 1978 testimony -- perhaps inadvertently -- demonstrates yet another persuasive argument **against** creation of performance rights in this context. That during the generations in which broadcasting of sound recordings has been an unregulated activity (an aspect of the "public domain"), a variety of arrangements have been made in reliance on this state of the law:

> Now, broadcasters and other commercial users, but primarily broadcasters, used sound recordings without paying royalties to their performers and their producers for generations . . . . Users today generally complain that they are going to have to pay a tax now, and they will call it a tax, there is no question about this.[37]

Without substantial new justification, the Copyright Office should not recommend changes in current law which could profoundly disrupt the arrangements under which the producers and users of prerecorded works have done business for decades.

36/ The unchanged practice in the recording industry is to provide radio stations with free copies of records -- an unmistakable demonstration that record companies recognize the benefits they receive from over-the-air play.

37/ 1978 Report at 129. Another dimension of the unsettling effects that change in the law would have on current arrangements was articulated in the Copyright Office's 1965 Supplementary Report which expressed "concern" that "the recognition of a performing right could introduce new and unpredictable factors of bargaining with performers into an already crowded and complicated copyright structure." Id. at 51-52. See Office of Technology Assessment, **Copyright and Home Copying: Technology Challenges and The Law**, OTA-CIT-422 (Washington, D.C., U.S. Gov't Printing Office, October 1989) at 96-100.

C. Justification For Performance Rights In Sound Recordings Cannot Be Gleaned By Comparison With The Intellectual Property Laws of Other Countries.

Proponents of performance rights in sound recordings should be able to take no particular comfort from the fact that such rights are recognized under the laws of many foreign countries. As is the case with American copyright, so the genesis of every foreign system is to be found in a complex blending or balancing of interests; to compare one feature of American law with one feature of analogous foreign law without taking account how each feature figures into the entire legal scheme of the respective country can produce exceedingly misleading results. For example, many foreign legal systems deny protection to sound recordings as works of "authorship,"[38/] while affording producers and performers a measure of protection under so-called "neighboring rights" schemes.[39/] While that protection may more generous in some respects than sound recording copyright in the United States, entailing the right to collect royalties in connection with public performances, it is distinctly less generous in

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38/ See Dietz, "Ten Propositions on Publisher's Copyright," 3 Rights (Summer 1989) at 5,6. A classical statement of the grounds for resisting assimilation of sound recordings to traditional subject matter is to be found in Professor Henri Desbois' treatise, **Le Droit D'Auteur en France** (3rd ed. 1978), where he states the view that "phonogram producers engage in activities of an **industrial character**, which are extremely useful for the development of musical or literary culture, but which do not have the characteristics of intellectual creativity." Id. at § 187. In this view, sound recordings, though worthy of protection, do not qualify as works of "authorship."

39/ While some countries afford protection under the mainstream law of copyright or authors' rights, many of those which reject the analogy between sound recordings and traditional subject matter, provide protection by means of special legislation. See generally, G. Davies and H. von Rauscher auf Weeg, **Challenges to Copyright and Related Rights in the European Community** 2-9 (1983).

others: The term of protection for sound recordings in many neighboring rights jurisdictions, for example, is limited to a fixed term of years,[40] sometimes far less than that allowed for sound recording copyright under U.S. law.[41] In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

In this connection, Article 2 of the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (to which the United States became a party in 1989) does not mandate the protection of sound recordings under national laws of copyright or "authors' rights" in signatory countries. The absence of sound recordings from that article's itemization of protected works has the effect of permitting Berne Union nations, at their option, to afford protection to sound recordings by other means -- or not at all.[42] It is also noteworthy that the participants in the meeting of the Committee of Experts

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40/ In France, the rights of performers and phonogram producers are recognized, under Article 30 of Title II of the 1985 Act, to fifty years from the beginning of the year of "first communication" of a recording, M. Nimmer and P. Geller, International Copyright Law and Practice (1989) at FRA-99 (discussion by Prof. Robert Plaisant), and see generally, Chesnais, "Les Droits Voisin du Droit D'Auteur II: Producteurs de phonogrammes et vidéogrammes et entreprises de communication audiovisuelle," 128 R.I.D.A. 67 (1986). In Germany, performers' and producers rights expire 25 years after publication or (in the case of unpublished recordings) production. Nimmer & Geller, supra at FRG 125-127 (discussion by Dr. Adolf Dietz). Both countries, incidentally, are signatories of the Geneva Phonogram Convention of 1971 and the Rome Convention of 1961 -- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

41/ As "works made for hire," sound recordings currently are entitled to protection under U.S. law for the lesser of 75 years from the date of publication, or 100 years from the date of creation. 17 U.S.C. §302(c).

42/ See S. Ricketson, **The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986** (1987), at §§ 6.66 & 6.78.

on Model Provisions for Legislation in the Field of Copyright, convened by the World Intellectual Property Organization in July 1990, failed to agree on whether sound recordings should be added to the non-exclusive list of predictable works in Section 3(1) of the "Draft Model Law on Copyright," even on an optional basis. Seven national delegations (including that of the United States) and three international non-governmental organizations favored the inclusion of sound recordings; eight delegations (including France and Germany) and five NGO's were opposed.

Proponents of inclusion pointed out that "[m]ore than 40 countries do actually protect sound recordings as works and about 12 countries do protect sound recordings as literary and artistic works;" opponents argued that "[t]hose who allege that more than 40 countries protect sound recordings by copyright forget that copyright is used in different meanings in different countries," and "it is doubtful that there is real copyright protection in the sense in which this protection exists in the Berne Convention even in the 12 countries to which reference has been made . . ."[43/] Obviously, the case of American copyright, which denies the public performance right to protected sound recordings, exemplifies this last argument. What this ultimately demonstrates, however, is not that the United States is out of line with an emerging international consensus. Rather, it demonstrates that no such consensus exists. Each country which affords protection to sound recordings has tailored that protection to fit its own

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43/ "WIPO Meetings: Committee of Experts on Model Provisions for Legislation in the Field of Copyright -- Third Session," Copyright, September 1990, at 241, 262.

legal tradition. Our tradition is one which gives great weight to the interests of the consuming public, in which proposals to expand the scope of copyright protection should be subject to close, critical scrutiny.

IV. CONCLUSION

It yet may be demonstrated that DAB technology poses such significant risks to the proprietary interests of copyright proprietors in musical works and sound recordings that the enactment of new, narrowly-conceived statutory measures is necessary to safeguard those interests. Any such measure, however, should represent the "least restrictive alternative" where the competing interests of the consuming public are concerned. Even in the worst case, the introduction of this new technology would not, in itself, justify the enactment of an "across-the-board" performance right in sound recordings, applicable without regard to the manner in which they are transmitted. Whatever the shortcomings of the legislative process, the sum total of American copyright doctrine represents a complex and hard won balance between a number of distinct interests. That balance should not be lightly upset -- especially in ways which would augment the rights of private proprietors at the potential expense of the ultimate intended beneficiaries of the copyright system.

Almost thirteen years have passed since the Copyright Office recommended the enactment of a performance right in sound recordings. The outcome of the present Copyright Office Study should not be dictated by allegiance to that former recommendation, premised as it was on a principle that as matter of "equity" -- or simply of definition -- all copyrighted works are entitled

to parity of protection. That principle, however, has outlived its utility as a useful guide to the formulation of public policy. With the passage of time, the list of works protected under copyright has grown, and the need to tailor the protection granted each kind of work to the special circumstances of its producers and consumers has become ever more apparent. It is too late in the day to decide a question as important as that presented by this Study on the basis of an intellectual reflex.

Nor does the comparison of the treatment of sound recordings in United States law and the law of foreign countries provide any basis for a recommendation of the enactment of a performance right. Although it is true that the United States provides sound recordings with more protection than many countries, and not as much as some, this is no more than a reflection of the fact that the American copyright tradition is a distinct one, with its own animating values. In a consideration of the impact of DAB technology on the recording industry and the consuming public, those values will be served only if proposals for new, restrictive copyright legislation are both narrowly drawn and compellingly justified.

RESUME

Name:	Peter Andrew Jaszi
Present Position:	Professor of Law, Washington College of Law The American University 4400 Massachusetts Ave., N.W. Washington, D.C. 20016 (202)885-2638
Permanent Address:	5402 Surrey Street Chevy Chase, MD 20815 (301)656-1753
Secondary Education:	Bethesda-Chevy Chase High School
Undergraduate Education:	Harvard College, A.B. 1968 (magna cum laude in English). Phi Beta Kappa, Harvard College Scholarship, Signet Society.
Professional Education:	Harvard Law School, J.D. 1971 (cum laude).
Bar Membership:	District of Columbia (May 1972).
Professional Memberships:	Selden Society (State correspondent for Washington, D.C., 1983-present), Copyright Society of the U.S.A., International Association for the Advancement of Teaching and Research in Intellectual Property.
Editorships:	Editorial Board, Journal of the Copyright Society of the U.S.A. (1985-1987).

Consultantships, Committee Memberships:

American Association of Law Schools, Special Committee on Fair Use (charged with study of doctrine as applied to higher education, preparing final report circulated in 1989 to all Association member schools) (Member since 1983-1985, chair 1985-1989).

Educators' Ad Hoc Committee on Copyright Law (developing and presenting positions on copyright issues on behalf of the American educational community)(1983 - present).

Publications: Legal Issues in Addict Diversion (Lexington Books, 1976) (with Harvey Perlman).

The New Justice: Alternatives to Conventional Criminal Adjudication (G.P.O. 1977) (with David Aaronson, Bert Hoff, Nicholas Kittrie and David Saari).

"Victim Interests in Anti-Terroristic Legal and Law Enforcement Policy," in Dimensions of Victimization in the Control of Terroristic Acts (ICC, Montreal, 1977).

"When Works Collide -- Derivative Motion Pictures, Underlying Rights, and the Public Interest" 28 U.C.L.A. L.Rev. 715 (1981).

"Who Cares Who Wrote 'Shakespeare,'" and "Brief and Reply Brief of Appellant Edward De Vere, Seventeeth Earl of Oxford," 37 American University Law Review 617 and 645 (1988).

"Protection of Copyright in the United States," in the Proceedings of the WIPO Regional Training Course on Copyright Trials (Beijing, P.R.C., 1989)[in Chinese, forthcoming in English from WIPO, Geneva].

"A Garland of Reflections on Three International Copyright Topics," 8 Cardozo Arts & Entertainment Law Journal 47 (1990).

"Towards a Theory of Copyright: The Metamorphoses of Authorship," 1991 Duke Law J. ___ (forthcoming).

Copyright Law (casebook published in 1986 with co-authors Craig Joyce, Marshall Leaffer, and William Patry, forthcoming Spring 1991).

In Progress: World Copyright: A Comparative Approach (comprehensive treatise, under contract to Bureau of National Affairs, with co-author John Grossman).

Litigation: Epoch Producing Corp. v. Killiam Shows,Inc. 522 F.2d 737 (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976) (motion picture copyright case establishing inter alia that certificate of copyright renewal is not entitled to prima facie weight; co-counsel for successful appellant).

Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949 (1977) (motion picture copyright case holding that copyrighted derivative film may be used without consent of owner of renewal in underlying work; co-counsel for successful appellant).

United States v. American Film Institute, 79 F.R.D. 374 (D.D.C. 1978) (establishing applicability of federal interpleader procedure to non-proprietary interests in prints of motion pictures in the collection of the Library of Congress).

Filmvideo Releasing Corp. v. Hastings, 668 F.2d 91 (2d Cir. 1981) (motion picture copyright case involving status of public domain films based on copyrighted novels; co-counsel for appellant).

Informal publications, addresses, papers presented, etc.:

"The Fair Use Doctrine" (panel on "Universal City Studios v. Sony Corporation: History, Status, Consequences"), Conference on Copyright and Home Recording: The Betamax Case and Beyond, Rosslyn, Virginia, April 23, 1982.

"Derivative Films and Underlying Works," Federal Bar Association Annual Copyright Conference, Washington, D.C., April 7, 1983.

"Substantial Similarity in Audiovisual Work Litigation," Copyright Society of the U.S.A., Lake Mohonk, N.Y., June 14, 1983.

"Audiovisual Copyright Infringement in U.S. and U.K. Law," British Literary and Artistic Copyright Association, Institute for Advanced Legal Studies, University of London, June 19, 1984.

"Implications of Intellectual Property Rights for Future Technology," Conference on Home Entertainment, Information and Transactions, Opportunities Afforded by Developing Technologies -- 1985-2000, U.S.J Congressional Office of Technology Assistance, January 9, 1985.

"Current Developments in International Copyright Law" (panel chair), Federal Bar Association Copyright Conference, Washington, D.C., March 7, 1985.

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"Fact Works and All That -- A (Slightly) Structuralist Overview," A.B.A. Section of Patent, Trademark and Copyright Law program on Fundamentals of Intellectual Property Law Practice Before Agencies Courts and in Corporations, Arlington, Virginia, March 20, 1987.

"A Copyrightability Potpurri," Tenth Annual Institute on Contemporary Copyright and Proprietary Rights Issues, co-sponsored by Prentice Hall Law & Business and the Federal Bar Association, Washington, D.C., June 4, 1987.

"Recent Developments in U.S. Intellectual Property Law," China Trade Mark Agency, China Council for the Promotion of International Trade, Beijing, People's Republic of China, June 19, 1987.

"Recent Developments in U.S. Copyright Law," National Copyright Administration, Beijing, People's Republic of China, June 22, 1987.

"The Problem of Substantial Similarity -- A View from the Other Side," U.S. Copyright Office Staff Seminar, Washington, D.C., August 18, 1987.

"Testimony on Copyrightabililty and Registrability of Computer Screen Displays," U.S. Copyright Office, September 10, 1987.

"Jaundiced Reflections -- End of Software's Golden Age?," SPA News (Newsletter of the Software Publisher's Association), Jan/Feb. 1988 at p. 3.

"Copyright and New Technologies in American Law," Intellectual Property Program of the People's University, Beijing, People's Republic of China, June 16, 1988.

"Current Developments in American Intellectual Property Law," Trademark Agency, China Council for the Promotion of International Trade, Beijing, People's Republic of China, June 21, 1988.

Testimony on New Technology (Colorization) and Audiovisual Works," U.S. Copyright Office, September 8, 1988 [cited in Technological Alterations to Motion Pictures, A Report of the Register of Copyrights issued March, 1989].

Database and Computer Software Copyright," International Copyright Insitute Training Program for copyright officials of Pacific Rim countries, U.S. Copyright Office, September 29, 1988.

"Fundamentals of International Copyright," a full-day program organized with David Nimmer and Professor Lionel Sobel, Washington College of Law, Washington, D.C., November 4, 1988 [repeated in March, 1989, Cardozo School of Law, New York City].

"Sec. 337 and the GATT," panel presentation at the Conference on the Omnibus Trade and Competitiveness Act of 1988, Regional Meeting of the American Society of International Law, Washington, D.C., Nov. 17, 1988.

"The Work for Hire Doctrine," panel moderator at conference on Cutting Edge Issues in Copyright and Trademark Law, sponsored by Bureau of National Affairs, Washington, D.C., March 9, 1989.

"Recurrent Problems in American Copyright Doctrine," presentation to the Copyright and Publishing Delegation of the State Council, Bureau of Legislative Affairs of the People's Republic of China, Washington, D.C., May 4, 1989.

"Legal Stories and Social Discourse," discussant at conference on Dialectic and Narrative, International Assocation of Philosophy and Literature, Atlanta, Georgia, May 6, 1989.

"Moral Rights Legislation," panelist at annual meeting of the Copyright Society of the U.S.A, Baltimore, Maryland, June 12, 1989.

"The ABC's of Copyright Law," presentation to seminar at Annual Meeting of the D.C. Bar, Washington, D.C., June 22, 1989.

"New Technologies and Copyright Doctrine" and "Educational Use and Copyright Doctrine," presentations to International Copyright Institute training program for Egyptian officials, U.S. Copyright Office, Washington, D.C., June 22-26, 1989.

"From Berne to the Uruguay Round: Two "models" for multilateral international agreements concerning the recognition of intellectual property interests," paper presented at the Annual Meeting of the American Political Science Association, Atlanta, Georgia, September 2, 1989.

"Computer Programs and Data Bases," presentation to the International Copyright Institute training program for officials from the Persian Gulf States, U.S. Copyright Office, September 14, 1989.

"Trends in Intellectual Property Law," presentation at Symposium on Ways of Knowing, Smithsonian Instiution, Washington, D.C., September 19, 1989.

"Protecting U.S. Intellectual Property in the International Market," panelist at Second Annual Conference on International Trade, International Legal Studies Program, Washington College of Law, Washington, D.C., October 13, 1989.

"Protection of Copyright in the U.S.," presentation to Regional Training Course on Copyright Trials, World Intellectual Property Organization, Beijing China, November 2, 1989 [also participating in a full-day mock trial illustrating American copyright ligitgation and various panels between October 30 and November 3].

Testimony on H.R. 671, relating to remedies in copyright infringement actions, on behalf of the Educator's Ad Hoc Committee on Copyright, before the Subcommittee on Courts, Intellectual Property and the Administration of Justice, Committee on the Judiciary, U.S. House of Reprentatives, Washington, D.C., April 5, 1990.

"Theorizing Copyright Doctrine: Some Uses of Authorship," paper presented to the Annual Meeting of the American Society for Eighteenth Century Studies, Minneapolis, Minn., April 26, 1990.

"Copyright Ownership and Transfer," presentation to the Practicing Law Institute program on Current Developments in Copyright Law, New York City, June 25, 1990.

"International Copyright and International Communications," lectures to the Cardozo in Budapest program of the Cardozo School of Law, Yeshiva University, Budapest, Hungary, July 1990.

"Equilibrer les interêts dans le droit d'autuer americain," Training Program for Francophone Countries oranized by the U.S. Copyright Office and the World Intellectual Property Organization, Washington, D.C., September 19, 1990.

Other: Expert witness and consultant on copyright issues to Mead Data Central in connection with the trial of West Publishing Company v. Mead Data Central, 799 F.2d 1219 (8th Cir. 1986)(concerning plaintiff's claims of copyright interest in page numbers of published law reports). Retained following the Eighth Circuit's ruling affirming the grant of a preliminary injunction against Mead. The trial took place in the United States District Court for the District of Minnesota in April 1988, and the case was settled in July.

Expert witness for the plaintiff in Gardner v. von Furstenberg, et al., July 1990 (testifying on foreign law relating to "moral rights" of authors). After trial in the United States District Court for the Southern District of New York, the case was settled.

Expert witness for the defendant in Basic Books v. Kinko's, September 1990 (testifying on the issues relating to "fair use.") The case is pending in the United States District Court for the Southern District of New York.

Counsel for the Earl of Oxford in appellate moot court arugment on the authorship of the plays and poems generally attributed to William Shakespeare, conducted at The American University, Washington, D.C., on September 25, 1987, before a panel consisting of Justices Brennan, Blackmun and Stevens of the United States Supreme Court. The argument, which received extensive press coverage in the United States and abroad, was nationally telecast on the C-SPAN network.

APPENDIX B

DEFENDING AUDIO RECORDING RIGHTS

Audio Recording Rights Coalition
2001 Eye Street, N.W.
Washington, D.C. 20006

August 1986

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record highs, not thanked for their contribution to industry health by being forced to pay millions of dollars in additional tribute.

V. Only Wealthy Recording Companies, Artists, And Composers Would Benefit From A Royalty Tax -- Not The Artists Or Music That May Need Additional Support

The recording industry has tried to argue that a royalty tax is needed to aid composers and artists or to give it the resources to produce new or non-mass market music. The fact of the matter is that whatever small benefit struggling artists and composers would receive from such a tax would be insignificant in comparison to the millions of dollars that would flow to the real beneficiaries of the tax: the big six record companies, a few singer/songwriters, and already well-to-do publishing companies. Given the traditional tension between the interests of the copyright owner-record companies, on the one hand, and those of the composers and lyricists, on the other, Congress should be wary of any representations that S. 1739, even as amended, would actually bestow some benefit on the creative talent.

The current version of S. 1739 would distribute the lion's share of royalty taxes to the music publishing

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companies and record companies that own the overwhelming majority of copyrights in musical works -- compositions by songwriters -- and sound recordings -- prerecorded music. With respect to the relationship between composers and publishers, the percentage allocations of the bill would only reinforce current contractual arrangements. S. 1739 would do nothing to improve the bargaining position of struggling artists, and may erode what little power they do have.

The set allocation of the Musical Work Fund, one of the three funds that S. 1739 would establish, would, for example, reinforce the extraordinarily strong market position of music publishing companies. Such companies act as middlemen for marketing the works of composers to performers -- singers and instrumental groups. In return, composers typically sign away to these publishers 50% of all revenues from their copyrighted works. S. 1739 supercedes all privately negotiated contractual arrangements and actually would require this 50-50 distribution. Thus, the bill would further enrich these publishers -- who do extremely well in a business in which they receive revenues generated by the efforts of composers in their stable -- rather than adequately reward or encourage the composers themselves.[139]

139Indeed, business is so good for publishing houses that

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Even with a scheme that mandates that 50% of the Musical Work Fund be paid to songwriters, struggling composers and lyricists would see very little of the proceeds. It is likely that only a handful of songwriters would profit from a royalty tax: notwithstanding the 20% payment to Incentive Class claimants, the vast bulk of the home taping royalties would be paid to these already successful artists, who are certainly the least likely to be spurred on to new creative heights by payments from the royalty fund.[140] How much more incentive to create music does Michael Jackson require, above and beyond the $70 million he received from "Thriller?"

[footnote continued]

the owner of music publisher Chappell and Co. confessed that "[Y]ou can't lose money" and "[I]t's the most unbelievable business." S. Salmans, "A Song Plugger's Biggest Play: His Return as Boss," N.Y. Times, June 4, 1985, at D1.

140In 1979, for example, Warner Records paid 49% of the so-called "mechanical royalties" (paid by record companies to composers each time a song is recorded on an album or tape) to just 16 singer/songwriters and 51% went to publishers controlled by singer/songwriters. Prehearing Memorandum of the Recording Indus. Ass'n of America, CRT Docket No. 80-2, 29-30 (filed May 9, 1980) [hereinafter "RIAA Memorandum"]. To avoid paying 50% of their royalties to an established publishing company, singer/songwriters may establish their own publishing companies. This option is generally available only to those singer/songwriters with substantial marketplace clout.

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The primary beneficiaries of the royalty tax would be the large record companies, which own most of the copyrights in sound recordings: CBS, RCA, Warner, Polygram, Capitol, and MCA.[141] Together these six companies, through distribution agreements, control 82% of the market.[142] They would get an equally large share of the 60% of the Sound Recording Fund (which is, in turn, 75% of the whole pool) that is to be paid to record companies.

Even with the new distribution formula, the structure of the recording industry diminishes the likelihood that struggling performers or artists will be substantially better off. Although 40% of the Sound Recording Fund is earmarked for featured artists, whether artists realize a net gain ultimately will depend on negotiations between these mega-companies and the performers.

141CBS distributes the Columbia, Epic, and the independent Chrysalis labels; RCA distributes the RCA-Victor, Arista, and the independent A&M labels; Warner distributes the Warner, Atlantic, and Elektra/Asylum labels; Polygram distributes the Mercury, Casablanca, Polydor, Capricorn, RSO, and several classical labels; Capitol distributes the EMI, Capitol, and Ariola labels; and MCA distributes the MCA, Coral, and the independant Motown labels.

142L. Landro, "Merger of Warner Unit, Polygram Angers Troubled Record Industry," Wall Street Journal, Apr. 12, 1984, at 33.

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The bargaining power that large record companies wield over new artists will undercut the effort to distribute royalties to performers under S. 1739. Although the bill purports to supercede contractual arrangements between artists and the record companies, the companies can still use their clout to use the distribution of proceeds from the royalty taxes as an offset against any other payments that the companies will be willing to make to new artists.

That the industry will not hesitate to use payments under S. 1739 as an excuse for exacting contractual concessions from artists is demonstrated by a front-page article in The Wall Street Journal: even a big new star -- Patty Smyth -- after three years in the business, two albums, and several major tours, has earned less than $150,000 out of a total retail gross of exceeding $10 million.[143] The notion of Incentive Class payments to the most "struggling" of artists does nothing to change the relative bargaining positions of performers and the record companies. Overall, therefore, despite the fact that consumers will pay hundreds of millions of dollars

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143J. Zaslow, "New Rock Economics Make It Harder to Sing Your Way to Wealth," Wall Street Journal, May 21, 1985, at 1.

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in new taxes into a royalty pool, it is unlikely that struggling artists will see any improvement at all in their economic lot.

Moreover, and as to the monies that the record companies will receive from the Sound Recording Fund, there is nothing to prevent the industry from using the proceeds for anything other than to boost dividends to shareholders or to line the pockets of highly-paid executives. If the industry were genuinely interested in developing and recording classical music, or other music that is aimed selectively at narrower market segments, it could do so at present, with the record revenues and profits it is now enjoying. Neither the pending legislation nor the industry would earmark the money that is collected. It is entirely predictable, therefore, that those additional funds will not stimulate the production and promotion of innovative or specialized music, but, rather, will fall into corporate treasuries.

Given the flow of industry revenues, then, it is improbable that any home taping royalty will confer substantial benefits on struggling artists or encourage creativity. The recording companies themselves have been quite adamant that increases in compensation for composers under the Copyright Act should not be based on

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"the sympathetic imagery of the struggling songwriter."[144] The RIAA opposed any increase in the mechanical royalty rate because:

> An increase in the mechanical rate will inevitably result in enormous benefits for singers/songwriters who are already richly rewarded for their creative efforts . . . . The struggling composer, on the other hand, will see little measurable benefit from an increase, and might actually suffer harm.[145]

If it pays attention to its own words, then, it is difficult for the recording industry to be at all persuasive in justifying a royalty tax on the ground that it will aid struggling artists and composers or develop specialized music. Although any such argument is intended to arouse congressional sympathies, it is belied by the facts. Despite the efforts of those who have amended S. 1739 to embrace a royalty distribution formula, the harsh reality is that the industry is highly concentrated, that the industry has never been that sympathetic to the creative artists, and that, in any event, the vast bulk of the proceeds will be paid to the most successful performers, lyricists, and composers -- those who need the money the least. A realistic, candid

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144RIAA Memorandum, at 1.

145Id. at 25-26.

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appraisal of the royalty distribution scheme of the amended S. 1739 -- and not an emotional appeal -- reveals that these individuals and musical works that could genuinely benefit from additional industry support would receive little money from a royalty pot.

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January 24, 1991

United States Copyright Office
Library of Congress
Department 17
Washington, DC 20540

Re: Docket No. RM 90-6

Gentleman:

Station KKYY - FM hereby files Reply Comments in the above referenced proceeding.

We oppose any effort to expand the scope of this proceeding to consider performance rights in sound recordings. The Congress has consistently refused to amend the copyright laws to create such a performance right and there is no reason to do so. The recording industry is very healthy and they, together with performing artists, benefit greatly from the free airplay that we give to recordings.

The radio industry is already paying more than $100,000,000 in copyright royalties to songwriters and publishers of music. We are not getting a free ride!

Regarding digital audio broadcasting, there is no evidence that the introduction of DAB will result in an increase in home taping of our broadcast programming. We certainly will not benefit from such taping and, in fact, may be harmed by it. The proposed requirement that digital subcode information be transmitted by broadcast stations is an unnecessary and inefficient use of the broadcast spectrum.

We strongly object to any suggestion that broadcast stations be restricted in the number of selections from an album or by a particular artist. The government should not be interfering with the free exercise of programming discretion.

Very truly yours,

Robert J. Visotcky
Vice President &
General Manager
KKYY Y-95

BV/ea

9191
Towne
Centre
Drive.
Suite 350.
San Diego.
California 92122
619 452 9595
FAX 619 452 8087

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GENERAL COUNSEL
OF COPYRIGHT
JAN 31 1991
RECEIVED

Comment Letter
RM 90-6
No. 23

BEFORE THE UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

Notice of Inquiry; Digital Audio Broadcast and Cable Services; Copyright Office Study	Docket No. RM 90-6

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS

Introduction

On December 14, 1990, the National Association of Recording Merchandisers ("NARM") submitted comments in response to the Copyright Office's Notice of Inquiry, issued pursuant to a congressional request, regarding digital audio broadcast ("DAB") and cable services.

NARM is the national trade association representing the vast majority of sound recording retailers and distributors across the nation. NARM's members have a vital interest in new technology that affects the home entertainment industry, including the capacity to deliver digital audio programming, whether transmitted by satellite, terrestrial or cable systems.

Our initial comments noted that NARM is not opposed to the introduction of DAB per se and has not concluded that DAB, in and of itself, would necessarily result in a significant displacement of sales of sound recordings by our

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members. However, we also indicated that the combination of DAB and the capacity to create near-perfect quality copies of such broadcasts with digital recording technologies is quite another matter. Therefore, we noted that NARM is very much concerned about "the impact of DAB in conjunction with the presence of enhanced recording technologies such as Digital Audio Tape ("DAT") and DAT recorders". (NARM Comments at 2). We observed that:

> "the superior sound quality of DAB, coupled with the digital recording capabilities of DAT and DAT recorders, as well as cost factors, would be likely to increase home copying . . . . " (NARM Comments at 3).

Furthermore, we explained how the current system for the sale of copyrighted audio works through retailers provides access for the listening public to the works of lesser known or less commercially viable artists, as well as continued access to older works that have become less popular than they were when originally released.

In other words, the depth and breadth of the inventory carried by NARM members assures the public continued access to music other than currently popular "favorites" (e.g., "Top 40") or the relatively few popular classics and standards.

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At the same time, since the sale of such current "favorites" and classics generate a large percentage of audio retailers' revenue, the loss of those sales due to listener copying of DAB transmissions would cripple retailers' operations and their ability to carry less commercially successful titles.

Therefore, any implementation of DAB which permits copies to be made using digital recording capabilities would not merely undermine sales of such copyrighted music and threaten the viability of the audio retailers, but also would deny the public access to the broadest range of music.

Further, to the extent that the current retail distribution system is undermined by unrestrained use of digital recorders to make copies of DAB broadcasts, persons unable to afford the supplemental payment for a premium-priced digital audio delivery service would even be denied the possibility of acquiring the sound recordings of their choice among the more popular titles.

Various other parties also filed comments in this proceeding, including members of the broadcast, song writing and publishing and sound recording manufacturing industries. In their submissions, several commentors incorporated by reference their previous filings in a related proceeding concerning DAB before the Federal Communications

Commission.[1/] The referenced filings in the FCC proceeding, as well as advertising brochures and other material filed with comments in this matter, reflect in some detail the various businesses now underway or planned involving the implementation of digital audio transmission services.

Having reviewed these other comments, the record in the FCC proceeding, and additional public materials relating to digital audio transmission services, NARM submits the following "Reply Comments" in this matter.

Reply Comments

(1) NARM has reviewed further the full extent to which various formats of DAB are being, or soon will be, offered, and the extent to which those enterprises encourage and facilitate off-the-air copying of sound recordings with digital recording equipment. NARM has concluded that the threat of such copying already represents a clear and present danger to sound recording retailers and distributors, and, therefore, to the public's ability to purchase a broad cross-section of music.

Proposals for satellite and terrestrial broadcasts, premium cable programs and listener-selected pay-per-listen services have reached a point where the prospects for substantial copying of copyrighted works should be directly addressed by the Copyright Office and the Congress. This

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1/ Notice of Inquiry, GEN Docket No. 90-357, FCC 90-281 (1990).

likelihood is confirmed by the blatant advertising and promotional material contained in Tabs 3 and 4 of the Comments filed in this proceeding by the Recording Industry Association of America ("RIAA").

(2) The threat posed by DAB to a retail distribution system which now provides affordable public access to the widest variety of music, would not be averted by regulations or agreements which would prevent only second generation copying from such transmissions, i.e., which only preclude producing copies of the initial taped copy made from the actual transmission.

For example, implementation of the current serial copy management system ("SCMS"), designed to prevent second-generation copying in digital audio recorders, would require a signal either generated by the appropriate receiver, or included in the subcode of the transmission itself. Since the former approach is not yet required by law, RIAA suggests requiring that broadcasters include all subcode in their transmissions.

NARM supports inclusion of the SCMS system in digital recorders and the inclusion of the necessary activating subcodes in transmissions and receivers. However, neither approach may be adequate to deal with the basic problem posed for retailers and distributors by DAB and other digital audio

transmissions. Many listeners would lose their interest in purchasing a recording from a retail outlet, after making only one copy of the transmission of a hit song. Moreover, the incentive to buy an album, or to create a collection of songs by a favorite artist, would be substantially undermined by the announced plans to broadcast whole albums and "greatest hits" programs via digital audio formats.

Therefore, NARM is concerned that any remedy short of precluding all listener copying of digital audio transmissions, through the most appropriate technical means, may not effectively preserve the present wide range of public access to all recorded music. NARM is prepared to work with the Copyright Office to explore this issue further.

(3) With regard to sound recording performance rights, NARM believes that the ability to utilize DAB transmissions in commercial ventures without any need to obtain a performance license from sound recording manufacturers would leave the broadcast industry free to facilitate and encourage the taping of copyrighted recordings by listeners. At the same time, NARM is also concerned that creating a performance right in digital sound recording, without further restrictions, might result in some recording companies licensing broadcasters to carry on the very practices, such as broadcasting an entire digital album, that would undermine the current distribution system and deny the

widest public access to all music. Therefore, NARM is currently reviewing the RIAA proposal for the creation of a "performance right" for the recording industry and will provide the results of this review to the Copyright Office.

Respectfully submitted,

NATIONAL ASSOCIATION OF
RECORDING MERCHANDISERS

By: Burton V Wides

Charles B. Ruttenberg
Burton V. Wides

Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

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GEN... OF ...
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Comment Letter
CM 90-6
No. 24

January 30, 1991

Ms. Dorothy Schrader
General Counsel
Office of the Register of Copyrights
Copyright Office
James Madison Memorial Building
Room 407
First And Independence Avenue SE.
Washington, DC 20540
202 707-8380 (tel) / 8366 (fax)

RE: REPLY COMMENTS ON NOTICE OF INQUIRY, DIGITAL AUDIO BROADCAST AND CABLE SERVICES: COPYRIGHT OFFICE STUDY

Dear General Counsel,

On October 24, 1990 the Copyright Office posted a Notice of Inquiry requesting comments on Digital Audio Broadcast and Cable Services. Specific to the reply comments of Broadcast Data Systems enclosed herein, the Copyright Office is seeking proposals on the proper methods of compensating copyright owners while promoting the greatest availability of creative works to the public.

The Recording Industry Association of America (RIAA) made the initial comment to the Copyright Office asking for a public performance right on digital audio broadcasting and digital audio cable services. The RIAA urged the Copyright Office to recommend that Congress take action on a performance royalty, and to recommend legislation requiring broadcasters and cable operators to transmit accurate digital subcode information in CDs and other digital recordings.

BROADCAST DATA SYSTEMS (BDS) is in full agreement that a public performance right should be granted and collected on digital audio broadcasting and digital audio cable services.

However, Broadcast Data Systems differs from the RIAA in the manner in which the performance information would be acquired.

Broadcast Data Systems feels that legislation for digital audio subcodes is unnecessary since technology exists today which can identify songs for the purposes of compensating copyright owners for transmission of their works.

The technology, which Broadcast Data Systems provides, is passive and does not require inserting a code into a master recording. The technology is superior to an active coding system.

Not only does the technology exist, but it is already installed in the top 75

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markets of the US. Over 12,000 recordings have been placed into our system, with no alteration of any master recordings. Besides tracking thousands of recordings, our client list includes every U.S. record company.

BDS has an accuracy level of over 99%. Our service is cheaper than the subcoding proposal, and does not discriminate against independent record companies/artists or European record companies/artists.

Broadcast Data Systems is a subsidiary of BPI Communications, which publishes well-known trade magazines such as *The Hollywood Reporter*, *Billboard Magazine*, *AdWeek*, *American Film* and *Back Stage*. BPI Communications is owned by Affiliated Publications, publisher of the *Boston Globe*.

In nationwide operation since September 1989, Broadcast Data Systems presently monitors over 700 radio, television and cable stations in 75 markets. With the use of remote computers in each market, BDS has the ability to instantaneously gather and report data about songs and commercials being broadcast through a **passive pattern recognition technique which does not require any active coding or audio subcodes**.

The data is retrieved daily by a central computer in Kansas City and packaged into reports. The reports, which time stamp songs and commercials, are presently being purchased by record companies and radio stations.

SUMMARY: Broadcast Data Systems concurs with the RIAA that a performance right should be given to record companies and artists as compensation for performances on digital audio and cable services. Broadcast Data Systems believes that technology to monitor the performances on those services exists today and is implemented on a wide variety of broadcast and cable systems. It also believes that legislating an audio subcode would be expensive, time-consuming, possibly unconstitutional to the broadcasters and introduce unnecessary delays towards artists and record companies receiving proper compensation for performance rights.

Broadcast Data Systems would provide the technology and equipment to monitor any digital audio/digital cable service. The monitoring service could be used by either individual copyright owners or by existing performing rights organizations.

News articles and a brochure about Broadcast Data Systems are enclosed with this reply.

Attached is "*Reply to Policy Question (6)(d)*" which contains specific objections to the digital audio subcode.

Sincerely,

Robert Uhlmann
Chairman, Broadcast Data Systems

Broadcast Data Systems
Airplay Recognition Services

January 30, 1991

POLICY QUESTIONS FOR ADDRESSING COPYRIGHT INTERESTS REGARDING DIGITAL AUDIO BROADCASTING

FROM: ROBERT UHLMANN, CHAIRMAN
BROADCAST DATA SYSTEMS

REPLY TO POLICY QUESTION (6)(d): "Describe existing and contemplated digital audio transmission services, including a description of (d) any proposals concerning transmission of digital subcode information embodied on pre-recorded works".

Broadcast Data Systems (BDS) has the capability to identify pre-recorded works without a digital audio subcode. It is already installed nationwide in 75 markets, covering 78.5% of all U.S. households. Broadcast Data Systems monitors over 700 radio, television and cable stations, and has an accuracy level of over 99%. Our client list already includes every U.S. record company.

Broadcast Data Systems has passively encoded over 12,000 songs since it began operations in September of 1989. It has the capacity to encode older or newer songs, without re-issuing a new master of the recording. BDS can rapidly encode songs, and has the facilities to encode several thousand songs a week.

Broadcast Data Systems wishes to object to any proposals concerning transmission of digital subcode information for the following reasons:

A. A DIGITAL SUBCODE IS AN ACTIVE CODE.

An "Active System" requires every record company to insert a special code into the recording during the production stage. Remote monitoring devices then read these codes as they are broadcast in various markets and relay the information to a central computer. In recent years several companies have attempted an active approach to monitoring recordings (either songs or commercials), and have failed.

B. HISTORY OF OF ACTIVE SYSTEMS.

The first such system for television was proposed by a company called Digisonics in 1970 and then dropped. Then, in 1984, the FCC stopped requiring television stations to keep logs of their broadcasts which led to two new attempts. Those companies, Ad Audit and Telescan, lobbied the FCC and won approval to insert coded information on Line 22 of the video signal. However, both Ad Audit and Telescan failed to get financing, industry acceptance or to put a system in place. And, to the best of management's knowledge, there is extremely low probability

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that they will ever do so. While Telescan founder Burton Greenberg, who is a commercial producer in New York, still claims to be pursuing the concept, Ad Audit is now out of business.

In the radio area a company called AudioCom attempted to deploy a system requiring advertisers to insert a special low frequency signal into the ad. They had the additional problem that the signal actually created a mildly detectable low rumble noise, according to industry observers. This company went out of business in 1983.

C. SPECIFIC REASONS FOR FAILURE OF ACTIVE SYSTEMS.

The reason for the failure of active systems is that the concept of an "Active System" itself is seriously flawed in several respects:

1) "Active Systems" require that record companies agree to encode every song at their own expense. If complete industry cooperation is not achieved, then information for royalty purposes will not be available, except for those companies that agree to cooperate. It is now quite clear that such widespread industry cooperation is nearly impossible to achieve, and, since Broadcast Data Systems has already installed a nationwide "Passive System", unnecessary anyway.

2) The cost of encoding proposed by both Ad Audit and Telescan was high (Telescan would charge $150 per recording) logistically difficult requiring the recordings to be sent to special regional encoding centers. "Passive Systems" can work directly off a live broadcast; or in the case where cooperation is possible, directly from the master dub without additional production steps. Broadcast Data Systems presently encodes songs at no charge to their clients.

3) From a technological stand point, thirty seconds of recording material contains enough information to make it easily recognizable. Therefore,no inserted code is necessary for identification anyway. The only technological advantage of inserting coded information is that it significantly lowers the data processing required to monitor the broadcast. While this advantage may allow for slightly lower upfront hardware costs, it does not overcome the inherent disadvantages given above.

4) Importantly, in their approval ruling the FCC pointed out that Line 22 is the property of the broadcaster who technically could use zappers to eliminate the code from their broadcast. Many broadcasters threatened to do just that and in general the networks and stations indicated that they would not cooperate with a verification system unless forced to do so. Broadcast Data Systems does not place an active code into a recording, and in fact does not use a specific frequency, audio subcode or video line. Broadcast Data Systems does not need the cooperation of the broadcaster to detect songs.

5) Forcing broadcasters to cooperate will be extremely time-consuming. Since it is the purpose of the Copyright Office to give adequate compensation to copyright holders for transmission of their works, then the Copyright Office

should recognize that an active system such as the digital audio subcode will be fought in courts by broadcasters for many years. Constitutional rights will be called into question and needless legal delays will be incurred before artists and record companies could receive just compensation.

6) Since the subcode will have to be placed into a new recording at the production studio, the recording industry will have to agree upon standards and practices for using an active digital audio subcode. Reaching an industry standard will take time, and testing the standard in the field will take more time.

7) Once the standard is agreed upon and tested, all new songs will have to be encoded before a royalty system based on the active code can be put in place. It will take months and even years to encode each master recording with a digital audio subcode.

8) An active digital audio subcode is time consuming and costly, if we can learn anything from the history of previous active coding efforts. Broadcast Data Systems passively encodes the recordings in little time (about 3 minutes per recording) and at no cost to record companies or artists.

9) Re-mastering older recordings with a digital audio subcode will be extremely expensive and time consuming. Unless they are re-mastered, then those copyright holders will be discriminated against as the active system will not recognize performances of their songs. Broadcast Data Systems' passive encoding system will be able to encode older recordings with no remastering process and at no cost to the record company.

10) Recordings which are not mastered in the United States will not have a digital audio subcode. Therefore, they will not receive proper compensation as they will not be recognized by the active system. This is contrary to our foreign trade agreements. The United States will in effect impose a burden on our trade relationship with Europe by not allowing performance rights to European record companies and artists. US trade negotiators will have to compensate for the lack of complete protection for sound recordings in their dealings with other countries. Broadcast Data Systems' passive encoding system will be able to track foreign recordings, and, hence, avoid this potential problem with our European trading partners.

11) Recordings which are made by small independent record companies may not have the digital audio subcode. This allows the major record companies to discriminate against the smaller independents. Not only is this unfair competition, but America's new music has always sprung from underfunded individuals and smaller record companies. Broadcast Data Systems' passive encoding system will be able to track recordings from either major or independent record companies, without discrimination or added cost.

D. BROADCAST DATA SYSTEMS USES A PASSIVE SYSTEM TO TRACK SONGS.

Broadcast Data Systems designs, constructs, and operates broadcast recognition systems. These systems monitor television and radio stations on a continuous basis and identify the airplay of songs and commercials. Information obtained through the Company's broadcast recognition systems is combined with other auxiliary information and presented on-line to the Company's customers.

The Company's first system was installed in Los Angeles, California in January 1986. That pilot system monitored the broadcast of five radio stations on a 24 hour basis and identified up to 275 different songs per station with over 98.6% reliability. To the Company's knowledge, it was the first fully operational broadcast recognition system installed in the field.

Since that time BDS has installed a nationwide system utilizing the Company's proprietary technology. The nationwide system monitors several hundred radio and television stations while identifying the airplay of several thousand individual commercials and songs with over 99% reliability.

The Company's technology is "passive" and requires no special encode or cue to be present in the broadcast signal. It is therefore not necessary to alter the song or commercial in any way, or obtain the cooperation of broadcasters, in order to successfully identify relevant broadcast material.

The Company has a full staff of technical and customer support personnel who will implement a monitoring schedule for our customers and provide service to them.

As explained above, an active system requires placement of a special code into a master recording. For reasons explained above, an active system is too expensive, time consuming and cumbersome to offer much protection to the copyright holder.

A passive system, on the other hand, does not require special remastering procedures on a recording. Broadcast Data Systems has the only installed passive monitoring system in the United States, and is already monitoring over 700 radio, television and cable stations.

Broadcast Data Systems has the capability to monitor digital audio stations, in the same manner that it presently monitors analog stations (i.e., through the speaker outlet in the radio tuner).

Broadcast Data Systems' client list already includes every U.S. record company, and in fact provides Billboard Magazine with its Airplay Monitor chart. We can provide recommendations upon request.

SUMMARY. **BROADCAST DATA SYSTEMS** wishes to inform the Copyright Office about existing, implemented technology that can identify songs for the purposes of compensating copyright owners for transmission of their works. No further legislation is needed to mandate that a special active system be forced upon record companies and station broadcasters. Broadcast Data Systems would report airplay information to either direct licensees or performing rights societies.

News articles and a brochure about Broadcast Data Systems are enclosed.

QUESTIONS AND CORRESPONDENCE IS TO BE FORWARDED TO:

ROBERT UHLMANN
CHAIRMAN
BROADCAST DATA SYSTEMS
BOX 412616
1009 CENTRAL
KANSAS CITY, MO 64141
(816) 421-3700 / 6504 (fax)

KDKB
93.3 FM ROCKS ARIZONA

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Comment Letter
RM 90-6
No. 25

January 24, 1991

United States Copyright Office
Library of Congress
Department 17
Washington, DC 20540

RE: Docket No. RM 90-6

Gentlemen:

Station KDKB hereby files Reply Comments in the above referenced proceeding.

We oppose any effort to expand the scope of this proceeding to consider performance rights in sound recordings. The Congress has consistently refused to amend the copyright laws to create such a performance right and there is no reason to do so. The recording industry is very healthy and they, together with performing artists, benefit greatly from the free airplay that we give to recordings.

The radio industry is already paying more than $100,000,000 in copyright royalties to songwriters and publishers of music. We are not getting a free ride!

Regarding digital audio broadcasting, there is no evidence that the introduction of DAB will result in an increase in home taping of our broadcast programming. We certainly will not benefit from such taping and, in fact, may be harmed by it. The proposed requirement that digital subcode information be transmitted by broadcast stations is an unnecessary and inefficient use of the broadcast spectrum.

We strongly object to any suggestion that broadcast stations be restricted in the number of selections from an album or by a particular artist. The government should not be interfering with the free exercise of programming discretion.

Very truly yours,

Chuck Artigue
Vice President/General Manager

CA/ul

Mesa Radio, Inc./1167 West Javelina/Mesa, AZ 85210-5999/(602) 897-9300/FAX (602) 831-2591
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Edwin E. Wodka
Vice President
General Manager

January 24, 1991

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Comment Letter
RM 90-6
No. 26

United States Copyright Office
Library of Congress
Department 17
Washington, DC 20540

Re: Docket No. RM 90-6

Gentlemen:

Station KEGL hereby files Reply Comments in the above referenced proceeding.

We oppose any effort to expand the scope of this proceeding to consider performance rights in sound recordings. The Congress has consistently refused to amend the copyright laws to create such a performance right and there is no reason to do so. The recording industry is very healthy and they, together with performing artists, benefit greatly from the free airplay that we give to the recordings.

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We strongly object to any suggestion that broadcast stations be restricted in the number of selections from an album or by a particular artist. The government should not be interfering with the free exercise of programming discretion.

Very truly yours,

Ed Wodka

Eagle Radio, Inc.
One Xerox Centre
Suite 1400
222 Las Colinas Blvd.
Irving, Texas 75039
214-869-9700
Metro 263-9710

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KLSY Radio
12011 NE First Street
Suite 208
Bellevue, Washington 98005
(206) 454-1540

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January 25, 1991

Comment Letter
RM 90-6
No. 27

United States Copyright Office
Library of Congress
Department 17
Washington DC 20540

Re: Docket No. RM 90-6

Gentlemen:

Station KLSY hereby files Reply Comments in the above referenced proceeding.

We oppose any effort to expand the scope of this proceeding to consider performance rights in sound recordings. The Congress has consistently refused to amend the copyright laws to create such a performance right and there is no reason to do so. The recording industry is very healthy and they, together with performing artists, benefit greatly form the free airplay that we give to recordings.

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We strongly object to any suggestion that broadcast stations be restricted in the number of selections from an album or by a particular artist. The government should not be interfering with the free exercise of programming discretion.

Very truly yours,

Gary J. Robb
V.P. General Manager

cc: Norman Rau, President

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